THE HIGH COURT

[2025] IEHC 106
RECORD NO. 2019/142S

BETWEEN

AMBASAID LIMITED AND MKN INVESTMENTS LIMITED

PLAINTIFFS

AND

MBCC FOODS (IRELAND) LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 21st day of February, 2025

INTRODUCTION

1. These proceedings arise on foot of a lease (hereinafter "the Lease") dated the 17th of October, 2008, between John P. Kennedy and others of the one part and the Defendant (hereinafter "the Tenant") of the other part, whereby Unit No 1, 125 Omni Park, Swords, Co. Dublin (hereinafter "the Property") was demised to the Tenant for 25 years from and including the 14th of October, 2008, at a rent of €125,000.00 per annum payable quarterly in advance and subject to review in accordance with the provisions thereof and insurance, rent and service charge specified therein and the covenants on the part of the lessee and the conditions therein contained. Crucially, the Lease further provided for the exercise of a conditional break option at the end of the tenth year of the Term.

2. The question at the heart of these proceedings is whether the break option under the Lease was validly exercised by the Tenant when they purported to quit the Property in October, 2018, by reason of alleged:

(i) rent, service charges and insurance contributions due on the determination date;
(ii) failure to provide vacant possession by reason of a failure to remove Tenant fit-out; and
(iii) failure to return original documentation to the Landlord.

3. Despite the engagement of numerous experts on both sides, the commercial interests involved and apparent rights and wrongs on each side, the parties have been unable to settle this dispute through negotiation. This has resulted in a protracted hearing in two parts between the 26th of June and 3rd of July, 2024 and 2nd of December, 2024. Significant legal costs have undoubtedly been incurred. Between the first and second hearing dates, a Forfeiture Notice dated the 14th of November, 2024, was served on behalf of the Landlord on the basis of an alleged breach of the terms of the Lease and a failure to discharge the Rent and the Insurance Rent in the manner and at the times specified in the Lease. According to the Forfeiture Notice, the Tenant's indebtedness under the Lease stood in the sum of €1,067,359.38 as at November, 2024.

4. Although the issues in these proceedings are relatively net, there are significant conflicts of fact on key issues. Disputed evidence has been heard over the course of seven days as to, *inter alia,* whether rent was paid up to date as at the break date, whether there had been an agreed variation of rent payable under the Lease, whether rent due under the Lease ran from the date of the Lease or the date of occupation by agreement, what that date of occupation was, the date from which rent was paid, how service charges fell due to be paid under the Lease, the VAT treatment of service charges by the Landlord and whether this had contributed to an overpayment by the Tenant during the term of the Lease or excused any arrears alleged to be due, whether the Tenant was obliged to strip out the Property entirely (including Tenant installed staircase, windows and doors) in order to render vacant possession in the absence of other agreement between the parties and the costs of reinstating the Property to its condition at time of first letting.

5. The only core facts upon which there has been no dispute in these proceedings is that the notice of intention to exercise the break option under the Lease was served in accordance with the terms of the Lease on the 17th of May, 2017, and the Tenant ceased trading from the premises before the 14th of October, 2018, the break date. It is also common case that some tenant fit- out remained on the break date, there being no agreement between the parties in relation to removal of tenant fit- out and no agreement in relation to dilapidations. It is no longer in dispute that the downstairs glazing and internal staircase were items of tenant fit-out installed by the Tenant at its own cost.

BACKGROUND

The Property

6. The Property is comprised of s a self-contained unit located on one side of a car park also servicing the Omni Shopping Centre. The Property is an end of terrace unit with the front façade facing west across the main shopping centre car park. The principal entrance is presented on this façade. The left façade faces north across the main distribution road serving the shopping centre. A supplementary entrance is presented on this façade. The rear façade is rendered. An external service passage is presented along the rear elevation of the building. The Property is formed in modern construction and is presented with a coloured concrete cladding system. The Property has a flat roof.

7. On the break date, the Property presented with aluminium framed glazing systems to the north and west facades. It also presented with a suspended concrete floor at ground and first floor level. The staircase between ground and first floor is formed with a steel structure and timber threads. A communal escape staircase is presented in the building footprint adjacent to the rear right corner of the property. Direct access is presented from the Property to the staircase at ground floor level. The Property has an

escape route at first floor level. This escape route discharges to the communal corridors at first floor level adjacent to the escape staircase.

The Lease

8. The Lease in respect of the property is dated the 17th of October, 2008. It bears various signatures from members of the Kennedy and McKeon families on behalf of the Landlord. It was signed on behalf of the Tenant by one Michael Conroy.

9. The Lease term is stated as being for a period of 25 years from and including the 14th of October, 2008. Although the Lease is dated the 17th of October, 2008, by handwritten insertion, the liability date recorded in the typescript is the 14th of October, 2008, several days earlier.

10. The Lease specifies a permitted use of the Property "*as a restaurant with ancillary use as a takeaway*". The Demised Premises defined in the Lease as the "*Property*" is described in Clause 2(26) of the Lease in a manner which suggests that the glazing was included (see Clause 2(26)(g)) even though it is now accepted that the glazing was a Tenant fitting. The Plan appended to the Lease represents the Property in a "*shell and core*".

Service Charges under the Lease

11. Clause 1(8) deals with service charges and provides:

"Service Charge 'The aggregate of:-

(a) the Estate Contribution as defined in Clause 1(b) of Part 4 of the First Schedule hereto and

(b) the sum calculated on the basis of the following percentage (subject to variation in accordance with the provisions contained in Clause 8 of Part 4 of the First Schedule) of the Building Annual Expenditure as defined in Clause 2 (2) hereof that is to say 28.5199% of the Building Annual Expenditure payable in the manner described in Part 4 of the First Schedule hereto."

12. Clause 2(34) further provides in relation to "*service charge*" that:

"Service Charge" means the aggregate of:-

(a) the Estate Contribution as defined in Clause 1(b) of Part 4 of the First Schedule hereto and

(b) the sum calculated on the basis of the following percentage (subject to variation in accordance with the provisions contained in Clause 8 of Part 4 of the First Schedule hereto) of the Building Annual Expenditure that is to say the percentage specified in sub-clause 8(b) of the Particulars of the Building Annual Expenditure as defined in sub-clause (2) hereof payable in the manner provided in Part 4 of the First Schedule hereto."

13. Clause 3(1)(b) provides that the Service Charge which shall be paid "*yearly and proportionately for any fraction of a year during the Term from and including the Liability date at the times and in the manner provided in Part 4 of the First Schedule hereto and in the manner specified in Clause 4(1) hereof*."

14. Clause 4(1) provides for the payment of the rent, insurance rent and service charge without any deduction and without the Tenant exercising or seeking to exercise any right or claim to withhold any of the said monies or any part thereof or any right or claim to legal or equitable set-off.

15. Part 1 of the First Schedule set out the detail of the services to be supplied by the Landlord to the Tenant, for example, maintenance, repairs, keeping the unit in good condition, etc. Parts 2 and 4 of the First Schedule set out the details of the calculation of the service charges, payment of the service charges and the timing for the payment

of same by the Tenant to the Landlord. The Lease provides for a calculation date of the 31st of December, in each year or such other date as the Landlord may from time to time nominate.

16. Under the terms of the Lease a "*Total Annual Expenditure Account*" is prepared to show the total annual expenditure for audit by the Landlord's accountant. This expenditure is comprised of all costs, expenses and outgoings whatsoever incurred by the Landlord in respect of services and Value Added Tax (hereinafter "VAT") payable on the said sums. Based on the Total Annual Expenditure Account, the Lease provides that the Landlord's Surveyor prepares the Centre Annual Expenditure Account and the Estate Annual Expenditure Account and apportions the Tenant's cost items. The Landlord then prepares a Statement of Account which is to be provided to the Tenant, together with a copy of the Centre Annual Expenditure Account and the Estate Annual Expenditure Account.

17. The Lease makes provision for the Total Annual Expenditure Account to be prepared "*as soon as reasonably practicable after the end of each Landlord's Account year*" to be certified by the Accountant and the Centre Annual Expenditure Account and the Estate Annual Expenditure Account to be certified by the Landlord's surveyor and where this occurs this shall be conclusive evidence (save in case of manifest error) for the purposes of the Lease of all matters of fact referred to therein.

18. Clause 5 of Part 2 of the First Schedule provides that on the Liability Date and on each Gale day during the Term, the Tenant shall pay to the Landlord such sums in advance and on account of the Service Charge as the Landlord in its absolute discretion deems to be fair and reasonable interim payment in respect of the quarter or fraction of a quarter then commencing having regard to the anticipated Centre Annual Expenditure and the Estate Annual Expenditure in the then current Landlord's Account year. It is provided that the first of the said payments shall be in respect of the period from and including the Liability date. The Lease envisages a reconciliation within fourteen days of furnishing statement of account where money is owed to the Landlord but a set off against prospective payments on account of the Service Charge due by the Tenant to the Landlord until the Tenant gets credit for the whole of the excess. Clause 7 of Part 2 of the First Schedule provides for liability for service charge in the last year of the

Term on the basis of a "*proportionate sum calculated on a day-to-day basis in respect of the said last year*".

Obligation to Pay Rent

19. Under Clause 1(6) the initial rent reserved under the Lease is €125,000 per annum payable by equal quarterly payments on the Gale Days as defined in Clause 2(8) (1st of January, April, July and October). The rent commencement date specified in Clause 1(9) appears in typescript as the 8th of April, 2008, but was amended by hand to the 14th of April, 2009 on the Lease as executed resulting in a six month rent-free period from the liability date specified of the 14th of October, 2008.

Break Option

20. Clause 6(10) of the Lease is entitled "*Tenants option to Determine*" and provides as follows:

> *(1) if the Tenant shall desire to determine the Term at the end of the tenth year of the term (hereinafter in this sub-clause called the "Determination Date") and:-*
>
> *(i) shall give to the Landlord not less than 12 months previous notice in writing expiring on the Determination Date of such desire and*
>
> *(ii) shall up to the time of such determination pay the Rent the Insurance Rent the Service Charge and observe and perform all the covenants and conditions on the Tenant's part in this Lease contained and*
>
> *(iii) shall on the expiration of such notice give vacant possession of the entire of the Property to the Landlord freed and discharged from all incumbrances and all rights of third parties affecting*

the same howsoever created

(iv) shall on the expiration of such notice deliver this Lease to the Landlord together with such documentary evidence as the Landlord may reasonably require to prove that any incumbrances or rights of third parties which have hitherto affected the Property have been discharged or ceased and

(v) shall on the expiration of such notice pay to the Landlord any V.AT chargeable on or as a consequence of such determination

then immediately on the expiration of such notice the Term shall thereupon cease but without prejudice to the remedies of either party against the other in respect of any antecedent claim or breach of covenant

(b) If the Tenant shall give notice of its desire to determine as aforesaid then the Landlord shall be permitted during the six months preceding the expiration of such notice to affix and retain without interference upon any party of the Property suitable for the purpose a notice for the disposal by way of sale letting or otherwise of the Property and persons with written authority from and accompanied by the Landlord or its Agents shall be permitted at all reasonable times to view the Property but so that the proper use and enjoyment of the Property by the Tenant shall not be unreasonably interfered with

(c) In all respects time shall be deemed to be the essence of the clause.

As set out in its terms, Clause 6(10)(a)(ii) of the Lease not only makes payment of rent, insurance charge and service charge conditions to the valid exercise of a break option but also requires compliance with all covenants in the Lease as a condition of the exercise of the break option. This included an obligation under Clause 6(10)(a)(iii) of the Lease to provide vacant possession.

Tenant's Obligations in Respect of Repair, Maintenance, Alterations and Yield Up

21. The obligation of the tenant in respect of repair, maintenance, alterations and yield up is provided for in Clauses 4(6) and 4(15).

22. The Lease provides at Clause 4(6)(c) that:

> "*at the end of the Term to yield up the Property duly repaired and decorated in accordance with the provisions of the sub-clause and to make good any damage caused to the Property by the removal of the Tenant's fixtures and fittings furniture and effects and by the reinstatement of the Property pursuant to any covenant with the Landlord*".

23. Clause 4(6)(c)(vi) further specifies that the Tenant shall pay on demand a sum equivalent to the loss of rent and service charge incurred by the Landlord during such period as is reasonably required for the carrying out of works after the end of the Term by reason of any breach of this sub-clause and shall reimburse the Landlord on demand all expenditure reasonably incurred by the Landlord in carrying out such works without prejudice to any other right of the Landlord."

24. At Clause 4(15)(f), the Lease further provides that:

> "*At the end of the Term if so required by the Landlord substantially to reinstate the Property or any part thereof to the same condition as it was in when this Lease was granted such reinstatement to be carried out under the supervision and to the reasonable satisfaction of the Landlord's Surveyor PROVIDED ALWAYS that in the event of any breach of this sub-clause becoming apparent to the Landlord and the Tenant failing to remedy the same within fourteen days of receipt of written notice from the Landlord calling upon the Tenant to remedy such breach the Landlord shall be at liberty (but without prejudice to the right of re-entry of the Landlord and any other rights of the Landlord hereunder) to enter the Property and at the Tenant's expense to remove all such unauthorised alterations and additions as may be then and there found and in*

addition to such expense the Tenant shall pay to the Landlord all other expenditure property incurred by the Landlord including without prejudice to the generality of the foregoing reasonable surveyors' or other professional fees and legal costs."

PROCEEDINGS

25. The Landlord initiated these proceedings by way of summary summons issued on the 11th of February, 2019, seeking recovery of rent, insurance rent, and service charge as of the date of issue of the summons together with continuing rents and charges up to the date of judgment, interest, and costs. On the face of the summons, the Landlord sought judgment against the Tenant for the sum of €80,197.14 due and owing in rent, service charge, insurance rent and interest charges under the Lease. Judgment was also sought against the Defendant for continuing rent at the rate of €12,812.50 per month, service charge and insurance rent payable pursuant to the Lease from the date of issue of these proceedings up to the date of judgment.

26. By Notice of Motion dated the 30th of May, 2019, returnable to the 14th of October, 2019, an Order was sought granting the Plaintiff liberty to enter final judgment in the sum of €122,711.82. The application was grounded on an Affidavit of John McKeon on behalf of the Landlord.

27. In the grounding affidavit, Mr. McKeon relied on a Statement of Account dated the 19th of October, 2018, and later Statements of Account, but made no reference to the purported exercise by the Tenant of an option to break the Lease under Clause 6(1) in consequence of which the Tenant claimed not to be liable in respect of the sums claimed under the Lease. The break option was, however, referred to on behalf of the Tenant in correspondence dating to the 1st of November, 2018 as exhibited in the grounding affidavit. In correspondence in response on the 5th of November, 2018, it was maintained by solicitors on behalf of the Landlord that the Tenant had not complied with all of the conditions in Clause 6(10) and that "*the caselaw in this regard is clear*".

28. Various supplemental affidavits (sworn on the 7th of October, 2019, and 17th of February, 2020) were filed on behalf of the Landlord exhibiting subsequent Statements of Account and the Landlord maintained a claim for all rent due under the Lease on an ongoing basis, notwithstanding that the purported exercise by the Tenant of the break option and the fact that the Tenant is no longer trading from the Property.

29. A replying affidavit was sworn by Michael Conroy, Company Director, on behalf of the Tenant in February, 2020, by which time the Landlord's claim was in the sum of €252,413.19 in respect of alleged arrears of rent, alleged arrears of service charge and insurance etc. due on foot of the Lease. Whilst accepting that the term of the Lease was for a period of 25 years from the 14th of October, 2008, Mr. Conroy referred to the break clause at Clause 6, confirming that on the basis of a lease commencement date of the 14th of October, 2008, that the Tenant was entitled to determine the Lease on that date in 2018 (on the tenth anniversary of the commencement date) by providing not less than 12 months' notice in writing on the Landlord.

30. Mr. Conroy further referred to Clause 6(11)(b) of the Lease which provides for how the said notice must be given. He referred to two letters dated the 17th of May, 2017. In these letters notice of the Tenant's intention to determine the Lease at the end of the tenth year of the Lease under Clause 6(10), namely the 13th of October, 2018, was given. He confirmed service of these letters by registered prepaid post at the addresses specified in Clause 1(1) of the Lease. He referred to the fact that the Tenant's solicitors also forwarded copies of the said letters to the Landlord's solicitor under cover of a letter dated the 17th of May, 2017. Mr. Conroy further confirmed that the Tenant's solicitors did not receive any response to the said letters leading them to write further letters dated the 7th of June, 2017. He noted that no response was received to any of these letters.

31. Mr. Conroy further confirmed that in, or during, the months of June and July, 2017, the Tenant was contacted by various parties who were considering renting the Property. Enquiries were received both in respect of the Property and in respect of the operations of the shopping centre in which it was situated. Mr. Conroy claimed that these parties made the aforesaid enquiries in circumstances where the Landlord's Agent

had, prior thereto, contacted those parties and enquired as to whether they would be interested in renting the said Property. Mr. Conroy specifically confirmed being contacted directly by two named property agents for potentially interested parties. He further confirmed speaking in June, 2018, with Paul Kelly of Mason Owens & Lyons, Letting Agents, who in turn communicated that they were actively seeking a replacement tenant and asked Mr. Conroy whether the Tenant would stay on in the Property, were different terms available. Mr. Conroy confirmed advising Mr. Kelly that the Tenant was not interested in remaining on in the said Property, whether pursuant to the Lease or otherwise.

32. In response to the contention in correspondence that the break clause was not validly exercised, Mr. Conroy referred to the Landlord's claim made after the 14th of October, 2018, that rent and service charges and insurance contributions were due, vacant possession had not been supplied and original documentation had not been returned to them. In relation to the claim that rent was due as at the date of purported determination of the Lease, he contended that all charges were paid up to date. He explained that there had been a delay in taking possession of the Property as Landlord works had not been completed by the 14th of October, 2008, with the result that the rent-free period ran from a later date (namely, the 21st of April, 2009, rather than the 14th of April, 2009) than that specified in the Lease by agreement with the Landlord. He contended that this variation of the written terms of the Lease was by verbal agreement.

33. Mr. Conroy further maintained that because of negotiations occurring during the economic downturn which coincided with the early years of the tenancy (causing a 19.5% reduction in turnover for the business for the year 2011 versus 2009, a reduction in footfall at the Shopping Centre and business closures leading to empty units) and in the context of rent arrears leading to the service of a forfeiture notice on the Tenant in February, 2011, variations were agreed whereby the rent payable in respect of the Property was not reduced, but was payable by the Tenant monthly in arrears by automatic means rather than quarterly in advance.

34. Mr. Conroy maintained that in consequences of these variations, the period in respect of which rent was due under the Lease, *viz.* from the 21st of April, 2009, to the 13th of October, 2018 – comprised of a period of 9 years and 176 days. He calculated

that the rent payable in respect of the period from the 21st of April, 2009, to the 21st of April, 2018, was in the sum of €1,125,000. He calculated that the period from the 21st of April, 2018, to the 13th of October, 2018, comprised of a period of 176 days. The notional daily rent – rounded up – in respect of the period from the 21st of April, 2018, to the 13th of October, 2018, was in the sum of €342.47 and therefore the total rent payable during that period was in the sum of €60,274.71. Accordingly, on his calculations, the total rent payable under the Lease up to the date of determination on the 13th of October, 2018, was in the sum of €1,185,274.72. He confirmed that the Tenant had in fact paid rent in the total sum of €1,186,044.52 prior to the 13th of October, 2018. Consequently, Mr. Conroy contended that there were no arrears of rent due on the 13th of October, 2018, and in fact, there had been an overpayment of rent in the sum of €769.80.

35. Turning to address the question of arrears of service charge or insurance charge, it was equally Mr. Conroy's contention on behalf of the Tenant that there were no such arrears as of the 14th of October, 2018. He referred to the fact that an employee in the Tenant's Account Department, one Katie Smith, on receiving the demand for service charges and the insurance rent on the 1st of October, 2018, from the Letting Agents, Mason Owen & Lyons, telephoned and spoke with the Letting Agent, noting the last full year's end for such service charges and insurance rent was the 30th of September, 2018, and requested a reconciliation of that year in view of the fact that the Tenant was to vacate the Property by the 14th of October, 2018. According to Mr. Conroy it was the Tenant's understanding that they would remain in credit once this reconciliation was done. Mr. Conroy confirmed on affidavit his understanding that Mr. Kelly had confirmed to Ms. Smith that he would prepare a reconciliation and furnish it to her as soon as possible, but that this would occur in any event, on, or before, the 13th of October, 2018. It was noted that while he confirmed that he would provide the reconciliation, Mr. Kelly had indicated that it was unlikely that an audit of the figures could be provided in that timeframe.

36. Mr. Conroy continued to depose to his understanding, on a hearsay basis, that Ms. Smith informed Mr. Kelly that in such circumstances the Landlords would be in receipt of monies from the Tenant and that the Tenant would not be able to reclaim

VAT. As such, the Landlords would remain with the benefit of these monies until such audit was completed. In this conversation, Mr. Conroy deposed to his understanding that Ms. Smith had explained that this was very undesirable for the Tenant and that she could see no legitimate reason for the situation to occur. He confirmed his understanding that Ms. Smith sought confirmation that the service charges and the insurance rent would only be payable in respect of the period from the 1st of October, 2018, to the 13th of October, 2018.

37. It was Mr. Conroy's understanding from Ms. Smith, as deposed to by Mr. Conroy on a hearsay basis, that Mr. Kelly did not revert as promised with the reconciliation of the Tenant's account and that the audit was not completed until May, 2019, some seven months later. Mr. Conroy maintained that by reason of this conversation the Lease was varied so that the quarter's service charge and the insurance rent payable on the 1st of October, 2018, was in respect of the period 1st of October to the 13th of October, 2018, payable upon the Landlords producing a reconciliation statement. It was his position that where no reconciliation had been produced by the Landlords, there were no arrears of service charges or the insurance rent on the 13th of October, 2018.

38. As regard the return of original documentation, Mr. Conroy maintained that he was not clear as to what documentation the Landlord referred to. He maintained that the only original documentation held by the Tenant was the Lease, He did not understand there to be any requirement that the Tenant return the original Lease for the exercise of its right to determine to be valid.

39. In relation to the contention that there had been a failure to deliver vacant possession on the 13th of October, 2018, Mr. Conroy confirmed the Tenant's departure from the Property on that date and removal of trade fixtures and fittings (such as KFC signs, KFC branded merchandise, seating etc.) in advance of that date. He accepted that the Tenant had left certain things, such as the built-in freezer units. He maintained that these items were left behind because the Property had been advertised as a fast-food outlet and such items would have a utility to a new tenant. He added that removal of the built-in freezer etc. would have left a gaping hole in the walls of the unit. He maintained that had such items been removed, it would have been viewed as an act of

bad faith. He contended that there was nothing to stop the Landlord or any new tenant taking possession of the Property on the 14th of October, 2018, and using it as a fast-food outlet – as required by the relevant planning permission – or indeed any other retail use. Furthermore, he said that the practice adopted by the Tenant is its standard practice when leaving a unit and would have always been welcomed by its former Landlords.

40. Mr. Conroy added that the only time that the Tenant would not adhere to this practice was where a unit was being let for another purpose and where to leave behind cookers, fridges, fryers etc. would he creating a problem for the Landlords. He further referred to the fact that he had emailed the Letting Agent, Mr. Paul Kelly of Mason Owens & Lyons, on the 12th of September, 2018, indicating what items the Tenant intended to leave in the Property when vacating. He had attached a plan (subsequently referred to as "the green plan" because the items being removed were highlighted in green) to that email which indicated the trade- specific items that the Tenant would be removing. The said map and email were exhibited. He referred to the fact that he received a response to the said email by an email dated 19th of September, 2018.

41. In the email of the 19th of September, 2018, Mr. Kelly indicated that he and the Landlord would like to inspect the unit and the items proposed to be left behind. He suggested Tuesday morning, the 25th of September, 2018, at 10 a.m. for this inspection and this time was agreed. Mr. Conroy confirmed this date and time and advised that Mr. Gordon Ritchie, the Tenant's head of Facilities for its KFC division, was travelling from Scotland in order to attend this meeting.

42. Mr. Conroy further averred, however, that as a result of a delayed flight Mr. Ritchie believed he would be approximately fifteen minutes late for the meeting. It was claimed by Mr. Conroy that he had telephoned Mr. Kelly, Letting Agent, upon leaving Dublin Airport to that effect. Mr. Conroy maintained that at that stage, Mr. Kelly, indicated that they had another meeting to attend but if Mr. Ritchie could wait, they would return after that other meeting and the inspection could be facilitated.

43. Mr. Conroy next deposed to the fact that neither the Landlords nor the said Agent returned or made any contact thereafter (it should be noted that somewhat different account of what happened was subsequently given in oral evidence before me.)

44. Mr. Conroy confirmed on affidavit that on the 9th of October, 2018, the Letting Agent emailed the Tenant and asserted that the Landlords now required the unit to be stripped to a "*grey box*" finish. Mr. Conroy pointed out that this was only five days before the Tenant was due to vacate the premises. He responded by an e-mail dated the 10th of October, 2018 noting the "*late in the day request*". He advised in the same email that the Tenant could not facilitate any "*grey box*" strip of the unit within the timeframe and he described the requirement as "*unreasonable*" in the circumstances. He noted that when the Tenant took possession of the Property, it had to put in all of the windows on the ground floor itself and it, in addition, had to put in its own stairs. He informed Mr. Kelly that if the Tenant were to strip the Property to how they had received it, it would mean taking the windows from the ground floor and the stairs out. He queried whether the Landlord would really want this.

45. Mr. Conroy confirmed that Mr. Kelly replied to this email of the 10th of October, 2018, by telephone call on the 10th of October, 2018, and stated that the Landlord wanted the unit stripped back to "*grey box*" but asked that the Tenant leave the stairs and ground floor glazing and shopfronts in situ. Mr. Kelly also made a request that the Tenant make contact with the relevant Shopping Centre's manager, namely Ruth Cody, so that Insurances for the proposed strip out could be approved and agreed. It was Mr. Conroy's understanding, however, that Mr. Ritchie had already been in touch with Ms Cody on the 1st of October, 2018, and had sent, *via* email, copies of the insurance indemnity and a completed insurance questionnaire. He further confirmed his understanding that all the insurances were subsequently approved by Ms Cody.

46. Mr. Conroy deposes that verbally and by further telephone call on the 10th of October, 2018, he informed Paul Kelly that the vacant possession

referred to in the Lease was not an "*a la carte*" position. He communicated that he felt that the agents were being unreasonable, and that the Landlord was trying to make the circumstances in which the Tenant was leaving the premises as difficult as possible. He confirmed thereafter that neither he nor the Tenant heard anything further until the Tenant received a letter of claim dated 19th of October, 2018, from the Landlords. He maintained that there was no obligation on the Tenant to leave the Property in the state or condition contended for by Mr. Kelly upon the determination of the Lease.

47. By Order dated the 9th of June, 2020, following on from delivery of Mr. Conroy's replying affidavit, the proceedings were transferred to plenary hearing and a Statement of Claim was subsequently delivered on the 29th of June, 2020.

48. The Statement of Claim pleaded reliance on the Lease, most specifically the term of the Lease and the covenant to pay rent, insurance rent and service charge under Clause 4 of the Lease. It was pleaded that wrongfully and in breach of its obligations under the Lease, the Tenant had failed to comply with its obligation to pay the rent, insurance rent and service charge. The total sum due and owing in respect of such arrears at the date of delivery of this Statement of Claim was given as €294,932.36, further particulars of same being set out in the Statement of Arrears appended to the Statement of Claim.

49. In its lengthy Defence and Counterclaim delivered in response, the Tenant repeated in large part what had already been averred on behalf of the Tenant in Mr. Conroy's affidavit. The Tenant denied all liability for the sums claimed expressly pleading as regards sums due up to and including the 13th of October, 2018, that no such sums are owing and in fact there was an overpayment by the Tenant of €769.80 in respect of this period. Specifically, the Tenant further asserted that its liability for rent as of the 13th of October, 2018, had been reduced as a result of agreed variations of the terms of the Lease or alternatively as a result of representations which the Landlords are estopped from denying. The variations/representations alleged are two-fold:

(i) Extension of the initial rent-free period until the 21st of April, 2009.

(ii) Rent payable monthly in arrears rather than quarterly in advance.

50. The Defendant also asserted a further agreed variation/representation to the effect that the payment of service charge and the insurance rent under the Lease in respect of any period after the 1st of October, 2018, would only be payable up to the 13th of October, 2018, and only upon production by the Plaintiffs of a reconciliation statement.

51. As regards rent, insurance rent and service charge alleged by the Landlords to have fallen due after the 13th of October, 2018, the Tenant pleads that no rent, insurance rent or service charge could have fallen due after this date because the Lease determined at midnight on the 13th of October, 2018, by reason of the exercise by the Tenant of a tenant break option contained in Clause 6(10) of the Lease, on which determination date the Tenant vacated the premises.

52. The Tenant counterclaimed for an order for repayment of the alleged overpayment of €769.80, together with Declarations as to variation and/or estoppel as aforesaid, and a further Declaration that that the Lease was determined at midnight on the 13th of October, 2018, at which point the Tenant had complied with all covenants of the Lease and was not in breach thereof.

53. The Landlords, in their Reply to Defence and Counterclaim, denied that the Lease had been varied or that any estoppel applied. Issue was joined with the pleas to the effect that the terms of the Lease as to rent had been varied by agreement whereby it was agreed that:

(i) Rent was not payable until 21st of April, 2009, (being a period of six months after the Tenant was able to take possession of the said unit).

(ii) the rent reserved by the Lease would be payable monthly in arrears.

54. Issue was also joined on the pleadings in relation to whether on the 14th of October, 2008, it being denied that a lot of the works which the Landlord had agreed to carry out on the said Property were still outstanding. Issue was joined on the question of whether a hole had been cut out in the upper floor to allow a staircase to be fitted. It was not accepted that the Tenant's contractor was unable to commence the fit-out works and it was denied that this was brought

to the attention of the Landlord on the morning of the 14th of October, 2014, either through one Eilish Brangan, the then manager of the Shopping Centre (since deceased) or Mr. McKeon.

55. The Landlords admitted the notification of the purported exercise of the break clause by the Tenant by letters of the 17th of May, 2017, but denied that these letters effected any valid and effective determination of the Lease in circumstances where, as of midnight on the 13th of October, 2018:

(i) Condition (ii) of Clause 6(10)(a) was not complied with insofar as the Defendant was in arrears of rent, insurance rent and service charge.

(ii) Conditions (ii) and (iii) of Clause 6(10)(a) were not complied with insofar as there had been a failure on the part of the Defendant to remove the entirety of their fit-out from the premises, thereby rendering the Defendant in breach of covenant for the purposes of 6(10)(a)(ii) and/or incapable of providing vacant possession for the purposes of 6(10)(a)(iii). In their Reply to Defence and Counterclaim, the Plaintiffs plead that as of midnight on the 13 October 2018 the Property was not in the condition required by the Lease for the valid exercise of the break option insofar as there had been a failure on the part of the Defendant to remove the entirety of their fit out from the premises.

(iii) Conditions (iv) of Clause 6 (10)(a) was not complied with.

56. Affidavits of discovery have been sworn and discovery documentation runs to some 1500 pages.

EVIDENCE

57. In total, some 18 witnesses gave evidence between witnesses as to fact and professional witnesses. This evidence was heard over seven days, six in June/July 2024

(when the hearing did not finish within its allocated time) and a further day in early December, 2024. Several witnesses gave evidence remotely. The evidence on key issues is conflicting. In consequence, I must reach findings of fact as a precursor to applying the relevant legal principles to determine this dispute. Furthermore, additional issues have been raised during litigation in relation to the approach to charging of service charges and VAT, even though these issues have not been shown to have been raised at any time prior to the determination of the Lease and were not the focus of express pleading.

58. I propose to now provide a summary of the salient elements of the evidence adduced during the hearing to the purpose of explaining the findings I make. As I did not have the benefit of a stenographer's transcript, my summary of the evidence is not based on a verbatim record. It is intended to capture the gist of the evidence only, save to the extent that I consider more detail necessary or relevant to a finding made.

Mr. Stephen Murray - Joint Letting Agent (called on behalf of the Tenant)

59. The first witness, Mr. Stephen Murray, was called out of turn, on behalf of the Tenant, to facilitate the witness. Mr. Stephen Murray gave his credentials as being a Fellow of the Society of Chartered Surveyors and Director of Jones Lang Lasalle where he was Head of Retail at material times. He confirmed that Jones Lang Lasalle had a role as joint letting agent together with Mason Owen & Lyons in marketing units available for rent at the Omni Shopping Centre. Mr. Murray confirmed that although he was involved at the outset in relation to the original letting to the Tenant, he had no involvement in the intervening years until service of the notice of intention to exercise the break option in May, 2017.

60. Following this, Mr. Murray confirmed that he had been involved in identifying alternative tenants. He accepted in his evidence that he proceeded with potential prospective tenants on the basis that existing restaurant fit- out could be beneficial to their use of the Property, circulating copies of the strip- out proposal (the Green Plan)

which the Tenant had provided to the Landlord, in accordance with which strip- out had occurred.

61. Having facilitated the Tenant by hearing Mr. Murray out of turn, the Landlord then went into evidence.

Landlord's Evidence

Mr. Paul Kelly, Landlord Letting Agent

62. The first witness called on behalf of the Landlord was Mr. Paul Kelly, Managing Director of Mason Owens & Lyons, the Letting Agent for the Property. Mr. Kelly outlined his qualifications as including being a Chartered Surveyor and a Member of the Institute of Chartered Surveyors of Ireland. He commenced employment in 1985. He has a long involvement with the Omni Park Shopping Centre and has worked in relation to property management and letting at the Centre since early 2010/11. Mr. Kelly is familiar with unit 1A formerly occupied by the Tenant and frequents the Shopping Centre on weekly basis.

63. In general terms, Mr. Kelly accepted in his evidence that the Tenant had an entitlement to determine the Lease at the end of the 10th year of the term, namely midnight on the 13th of October, 2008. His evidence, however, was that the entitlement to determine the Lease was subject to a number of conditions which had not been met.

64. The first condition claimed to have been breached that was addressed in his evidence was the condition that the Tenant shall, up to the time of such determination, pay the rent, the insurance rent, and the service charge. He contended that this condition had not been complied with because, on his calculations, the Tenant was in arrears of rent, insurance rent and service charge as of midnight on the 13th of October, 2018, the break date. He confirmed that he had prepared the statement of account dated the 18th of October, 2018 showing an amount due of €45,312.05

which was furnished to the Tenant by solicitor's letter dated the 19th of October, 2018, in which a seven-day period for payment of the sum claimed to be due and owing together with interest and costs was given.

65. The statement of account showed sums due and owing based on a claim for rent from the 1st of October, 2018, to the 31st of December, 2018, in the sum of €38,437.50, an interim service charge in the amount of €4,027.44 for the same period and a charge to insurance in the sum of €1,796.13 for the year 1st of October, 2018 to the 31st of December, 2018. It also showed previous charges to rent quarterly, but payments of rent monthly by standing order, paid at the beginning of each month with the final monthly rent payment for the period 1st of July, 2018-30th of September, 2018, seemingly paid on the 3rd of September, 2018. As he illustrated, the way the statement of account balanced suggested that rent was payable monthly in advance. The statement of account also showed payment of an interim service charge on a quarterly basis paid for the 1st of July, 2018 to the 30th of September, 2018, on the 1st of July, 2018, suggesting payment of service charges quarterly in advance. Unlike the rent payments, the payment in respect of service charges was not recorded as having been by standing order.

66. Mr. Kelly further confirmed that he had prepared a subsequent statement of account dated the 8th of January, 2019, showing amounts outstanding in the sum of €80,197.14 which was forwarded by solicitor's letter dated the 9th of January, 2019, with a demand for payment within 7 days. This statement of account recorded a further charge to rent on the 1st of January, 2019, for the period 1st of January, 2019, to 31st of March, 2019 in the sum of €38,437.50 and an interim service charge for the period 1st of January, 2019 to 31st of March, 2019 in the sum of €4,027.44 and reflected a payment by standing order of €7,579.85 made on the 2nd of November, 2018.

67. Mr. Kelly also confirmed that he had prepared further statements of account quarterly going forward in which additional charges to rent and service charge were made (including a statement of account on the 30th of April, 2019 in which the amount claimed as due and owing had risen to €122,711.82, 7th of October, 2019, in which the amount claimed as due and owing was recorded as €207,695.93, 10th

of February, 2020, in which the amount claimed as due and owing was €252, 413.19 comprised of quarterly rent charges, interim service charges and an annual insurance charge for an additional year 1st of October, 2019, to 31st of December, 2019).

68. Mr. Kelly was referred to correspondence sent in May, 2017, on behalf of the Tenant giving notice of an intention to exercise the right conferred by the break clause (Clause 6(10) of the Lease). He acknowledged an awareness of this correspondence and an acquaintance with other agents whom the Tenant had identified as having been in contact with it over the summer of 2017 with a view to their clients letting the property. Although he knew the agents identified, Mr. Kelly denied dealing with them in respect of the letting of the Property. He did not deny a conversation with Mr. Michael Conroy on behalf of the Tenant in June, 2018, in which Mr. Conroy had claimed that he had told him that the Landlord was actively seeking a replacement tenant and asked whether the Tenant would consider staying on in the unit "*if the Landlord was to seriously sharpen his pencil*" but claimed he did not recall the specific discussion confirming that he was dealing with Mr. Conroy on other matters at the time and might well have sought to ascertain if the Tenant were interested in staying on.

69. Asked to address the Tenant's contention that it had been requested by Mr. Kelly in discussion with Mr. Conroy to vary rent payments to pay monthly instead of quarterly (in Mr. Conroy's Affidavit of 24th of February, 2020, at para. 19), Mr. Kelly said that from the Landlord's point of view, having rent paid quarterly was more advantageous. He could not see on what basis the Landlord would have made such a request. He agreed, however, that he had started working for the Landlord around the time mentioned by Mr. Conroy in 2009 and he further accepted that there had been missed payments in 2009 and that from October, 2009, rent was paid monthly. He confirmed that the rent payments were made thereafter in mid/end of the month until June, 2011, when payments were made at start of each month. Despite this practice, Mr. Kelly confirmed his understanding as being that rent was to be paid quarterly under the Lease. While he did not dispute that there had been talks about a variation to monthly payments and that this variation in fact occurred, he asserted that he was not aware of any written agreement providing for monthly payments.

70. On the question of insurance and service charges, Mr. Kelly said that contrary to what was asserted on behalf of the Tenant (at para. 28 in the Affidavit of Mr. Conroy), he had no conversation with one Katie Smith on the 1st of October, 2018, following receipt of a demand for service charges by the Tenant in which she noted that the charges were paid up to date until the 30th of September, 2018, and requested a reconciliation to the break date. He maintained that this conversation was with a colleague (identified as one Gary Taaffe) and Mr. Kelly had not committed to provide the requested account before the 13th of October, 2018, as had been stated on behalf of the Tenant.

71. Mr. Kelly pointed out that a reconciliation of service charges due would not have been possible in advance of the 13th of October, 2018, because of the manner in which service charges were dealt with (audit required). He confirmed in evidence that this is what he told Mr. Taaffe when he raised the matter with him following a conversation with Mr. Smith. He further maintained that service and insurance charges were due annually in advance and therefore required to be paid at the time of the break date with a reconciliation to be performed subsequently. Mr. Kelly denied any agreement to provide a reconciliation. He did not accept, as contended on behalf of the Tenant, that in the absence of a reconciliation statement being provided, there were no arrears of service charge or insurance on the break date.

72. Mr. Kelly referred to the statements of account as prepared by him as accurately setting out the sums due as at the 14th of October, 2018, albeit that these statements of account claimed a full quarter of rent, insurance rent and service charges without reference to the break date of the 14th of October, 2018. He maintained that rent had always been billed quarterly in advance and that he would have no authority to agree any other arrangement.

73. Next, Mr. Kelly was asked to address the question of whether vacant possession had been provided on the 13th of October, 2018, as contended by the Tenant and as required in validly exercising the break option.

74. In this regard, Mr. Kelly was referred to Mr. Conroy's Affidavit sworn on the 24th of February, 2020, where he had confirmed that the Tenant had removed its trade

fixtures and fittings, but left certain things like the built-in freezer units, cookers and fridges because these items would be useful to a new fast-food outlet and removal would have left a gaping hole. At paragraph 31 of his Affidavit, Mr. Conroy had referred to his email to Mr. Kelly on the 12th of September, 2018, indicating the items the Tenant proposed to leave when vacating and identifying the items that it was intending to remove and further referred to Mr. Kelly's response a week later on the 19th of September, 2018, requesting inspection of the unit and the items it was proposed to leave behind on the 25th of September, 2018.

75. Responding to these averments, Mr. Kelly did not accept Mr. Conroy's contention that items left could be useful, indicating that they would only be useful if full-service records were left for the items to ensure health and safety standards, of which none had been left. He pointed out that a lot of international companies have a preference to use their own fit-out. He observed that it would cost money to remove the items and their utility would depend on the prospective tenant. Mr. Kelly did not agree that items left by the Tenants could prove advantageous to the Landlord.

76. Mr. Kelly acknowledged that an inspection was arranged for the 25th of September, 2018, at his request and accepted that one Gordon Richie was due to travel from Scotland on behalf of the Tenant to be present for the inspection. Mr. Kelly's evidence was that on the 24th of September, 2018, the Landlord requested an earlier time. This was agreed with Mr. Ritchie on the basis that one Fiona Cooke, a Tenant employee on site, would meet them at the premises and let them in and Mr. Ritchie would join them.

77. Mr. Kelly claimed that when he got to the premises on the 25th of September, 2018, there was nobody present. He stated that he and Mr. McKeon waited, but that the Landlord had to leave to go to another meeting.

78. Thereafter, a further inspection was rearranged for the following Tuesday, the 2nd of October, 2018.

79. Following inspection and some discussion, Mr. Kelly confirmed that the Landlord instructed that the unit should be stripped to original condition. This was

communicated to the Tenant by Mr. Kelly through email on the 9th of October, 2018. In this email, he requested that the Property be restored to a "*grey box*" condition in accordance with Landlord instructions. Mr. Kelly explained that this request was made in view of difficulties re-letting the Property to another tenant, as extensive work was required to remove fixtures left on site and dispose of them.

80. Asked about his experience acting in cases where a break clause was exercised, Mr. Kelly referred to one recent experience that occurred at the Shopping Centre of an international tenant who had served a break notice and appointed their own building consultant. On that occasion, agreement was reached on financial settlement rather than strip- out. He confirmed that break options are standard in commercial leases and that tenants normally seek to comply with obligations although it is usual to try to agree a handover specification so that there is no risk in relation to the valid exercise of the break option. Alternatively, Mr. Kelly observed, a tenant may also avoid risk by agreeing a financial settlement.

81. Mr. Kelly suggested that in this case, the Tenant had left it late to raise the issue of strip-out, although he accepted that there may have been telephone conversations in addition to email communication. He accepted, for example, that he may have called Mr. Conroy in reply to an email on the 10th of October, 2018, as Mr. Conroy had averred. It was pointed out by Mr. Kelly that in this email Mr. Conroy did not ask what was meant by "*grey box*" finish, but instead Mr. Conroy stated that the request for a "*grey box*" finish was very late in the day in circumstances where the notice of intention to exercise a break option had been served some time previously. In this email, Mr. Conroy had indicated that the Tenant was happy to meet to discuss the detail of the request, but only if there was clear acceptance that the changes were not possible within the remaining timescale and by agreement. It was further pointed out in this email that the initial tenant works included the shop fronts and the stairs.

82. While accepting that a conversation may have taken place as described by Mr. Conroy in response to this email, Mr. Kelly could not recall the specifics of the conversation. He did not deny, however, that he asked the Tenant to leave tenant fixtures such as the stairs and ground floor glazing and shopfronts in place notwithstanding the email seeking a "*grey box*" finish. He also accepted that by this

date, insurance was in place for Tenant strip-out works in terms previously approved (subsequent evidence which terms did not envisage removal of stairs, glazing or shop front.) He confirmed that he had no further contact with the Tenant after the 10th of October, 2018, in relation to the strip-out.

83. In response to the Tenant's contention that the Landlord had used the Property after the 13th of October, 2018, to advertise third parties by allowing advertisements for a "*circus*" to be placed in the shopfront, Mr. Kelly indicated that he knew that some posters were put up, but offered a view that as there is a gap between the door and the window frame that the posters could have been slipped in through the gap. He said he had no interaction with any one in relation to posters and did not consent to them being placed in the unit.

84. Mr. Kelly offered detailed evidence in relation to monies alleged to be due to the Landlord at the break date and by reason of the contended for failure to comply with the conditions necessary for an effective break of the Lease. His evidence to this effect was offered based on several identified key assumptions. He also offered evidence in relation to alternative scenarios to the Landlord's primary contention.

85. Mr. Kelly's first scenario was based on rent and service charges payable quarterly in advance and insurance payable annually in advance. This was the basis upon which the Statement of Account which issued on the 19th of October, 2018, was calculated. On this basis, his evidence was that €45,312.05 accrued quarterly and by the 30th of June, 2024, the account had risen to €979,834.27. He calculated that the total potentially due to the end of the full Lease term was €2,583,352.08.

86. Mr. Kelly offered evidence in the alternative on the basis of rent and service charges due to the break date only, namely the 13th of October, 2018. On his calculations on this scenario there was €7,747.22 due and owing on the 14th of October, 2018. When credit was allowed for the additional payment received on the 2nd of November, 2018, from the Tenant in the sum of €7,579.85 (reflecting an attempted or approximate calculation of 14 days rent and charges), this gave an outstanding figure due and owing after the payment of €167.37 on Mr. Kelly's calculations.

87. Mr. Kelly also offered computations to the Court based on rent chargeable monthly in advance, but with service charges quarterly and insurance annually. In a further computation, he furnished figures based on rent chargeable monthly, service charge quarterly and insurance adjusted for October, 2018.

88. His evidence in relation to each scenario was predicated on the assumption that the rent commencement date was that stated in the Lease, namely, the 14th of April, 2009, although it was put to him that the statement of account relied upon by him appeared to show rent as being charged from the 6th of April, 2009. Mr. Kelly confirmed that in the invoices or statements of account issued by him on behalf of the Landlord, he had always invoiced for rent and service charges quarterly and insurance annually. He confirmed also that billing was always in advance.

89. Mr. Kelly further confirmed that the Landlord was in advance negotiation with potential future tenants, but could not let the Property earlier because, without having served a forfeiture notice under the Lease (which Notice was ultimately only served in November, 2024, between the two hearing dates), the Landlord "*doesn't have possession*".

90. Under cross-examination, Mr. Kelly disputed speaking directly with Ms. Smith in relation to her request for a reconciliation statement in early October, 2018, when contacted by her upon receipt of the statement of account which had issued to point out that rent and charges were due to the break date and not for the entire quarter. He denied ever agreeing with her that insurance rent and service charge in respect of any period after the 1st of October, 2018, would only be payable up to the break option date and only upon the furnishing by the Plaintiffs of a reconciliation statement. He accepted, however, that she did request a reconciliation statement at that time in a conversation which he claimed was not with him, but with his colleague. He also accepted that he never instructed a communication to Ms. Smith to make clear that a reconciliation statement would not be provided before the break date.

91. Under cross-examination, the time-line was rehearsed with Mr. Kelly without dispute from him, notably the service in May, 2017, of notice of exercise of break

option, with a "*green plan*" identifying the fixtures and fittings with the Tenant proposed to remove sent to Mr. Kelly by Mr. Conroy on the 12th of September, 2018, the subsequent arrangement of an inspection meeting for the 25th of September, 2018, which meeting did not occur until the 2nd of October, 2018. Following on from this inspection which had been delayed despite arrangement and attendance on behalf of the Tenant to facilitate same and which only eventually occurred on the 2nd of October, 2018, Mr. Kelly accepted that he next corresponded by email on the 9th of October, 2018 to request a "*grey box*" finish for the first time. He did not demur from the fact that this in turn led to queries as to whether the Landlord understood that in requesting a "*grey box*" finish, this would entail removing stairs, windows, and shop front. Nor did he demur from the contention that he requested in a follow-on telephone call, days before the break date, that these items be left behind.

92. When it was put to Mr. Kelly that a "*grey box*" strip out was impractical, he accepted that it was impractical in the timeframe remaining at that stage (between the 9th and 13th of October, 2018). When it was put to him that a "*grey box*" finish was not in the Landlord's interests, he responded that "*it can be*". He further accepted that he did not revert to Mr. Conroy in response to his email of the 10th of October, 2018, in relation to the practicalities of providing a "*grey box*" finish by the 13th of October, 2018, and to agree an alternative to ensure the finish the Landlord required. He accepted that given the Tenant needed to be out by the break date, that the only way the additional works which the Landlord was now requiring could be done was by agreement. He further accepted, in the light of the Landlord contention not to be "*in possession*", that he never contacted the Tenant to agree access to enable final works required by the Landlord to be carried out. When it was put to him that the keys were handed back to the Centre Manager on Saturday the 13th of October, 2018, Mr. Kelly said that the Centre Manager (not available as a witness) did not receive keys.

93. Mr. Kelly was questioned in relation to email from Mr. Stephen Delmar of Jones Lang Lasalle dated the 18th of October, 2018, in which he marketed the Property as "*just vacated*" by KFC on the basis of the "*Green Plan*" previously furnished by the Tenant to indicate the items it had been proposed by the Tenant to leave *in situ* in their communications with Mr. Kelly up to September, 2018. Mr. Kelly indicated that he

was unaware of these marketing efforts indicating with reference to Jones Lang Lasalle that "*we act independently*". In the said email, Mr. Delmar confirmed that "*the fit out will be stripped however the structure of a restaurant will be in place which will likely be of interest*." Mr. Kelly accepted that the Green Plan as provided by the Tenant in relation to its proposal for rendering vacant possession, appeared to have been furnished to Mr. Delmar and used by him for marketing of the Property. He further accepted that this appeared to have been done without reference to any dispute as to what would be left *in situ* and what would be removed. He acknowledged that the restaurant fit-out was being relied upon as a "*selling point*" in Mr. Delmar's marketing of the Property.

94. Mr. Kelly was further referred to attempts to market the property by him in December, 2021, when he emailed Thunders Bakery with reference to the Property. Although the email mentioned figures for rates, service charge and insurance, Mr. Kelly was unable to confirm what rent was being sought. He did not dispute, however, that the marketing attempts made continued to be made on the basis of the Green Plan which had been furnished by the Tenant as its proposal for stripping out the Property. When presented with a further email sent by him to enquire as to the potential interest of a potential pizza/pasta chain, Mr. Kelly confirmed his view that this was not "*active*" marketing of the Property and was not inconsistent with the Landlord's claim not to be in possession of the Property.

95. Presented under cross-examination with photographs which showed the presence of posters advertising a circus in the Property, Mr. Kelly accepted that they could not have been slid down the back of the door as had been suggested on behalf of the Landlord, but could only have been placed in the Property by a person with access. While suggesting this and denying that he had provided access, Mr. Kelly then said that Mr. Conroy had access, suggesting that he might have permitted the placing of posters in the Property.

96. Asked to address the report prepared by Ger Holliday for Amesto Global on behalf of the Tenant in which Mr. Holliday sought to reconcile his findings with Mr. Kelly's calculations, Mr. Kelly accepted that his calculation of arrears included sums claimed in respect of water charges (in the sum of €1,051.00), did not allow a credit for

insurance, included a charge for rent for 8 days and did not allow for an additional week rent free by reason of late handover of the unit (€2,913.00). If these were correctly considered in the manner suggested on the Amesto Global figures (which Mr. Kelly did not accept was the correct approach), then Mr. Kelly accepted that this would result in the Tenant not being in arrears at all as of the break date.

97. When it was put to Mr. Kelly that Ms. Smith was not able to precisely calculate arrears due in the absence of a balancing statement, he referred to the statement of account which issued on the 3rd of October, 2018, in which the quarter's rent and service charges were sought, suggesting that this was the amount the Tenant ought to have paid. It was put to him, however, that the payment of €7,579.00 made on the 2nd of November, 2018, was a "*best estimate*" made in the absence of a reconciliation statement which she had sought, but had not been given and Mr. Kelly did not demur from this.

98. Considering the Amesto Report further, Mr. Kelly agreed that the service charges apportioned depended for accuracy on measurements of floor area. Mr. Kelly confirmed that he had not performed floor measurements and that these had been performed by design team. Insofar as some tenants received discounts on service charges, Mr. Kelly confirmed that this was provided for under individual leases. He maintained that the leases provided for fair and equitable weighting. He acknowledged that the treatment of VAT by the Landlord was such that VAT was invoiced after the end of the Landlord year, with the Tenant receiving a credit note interim service charge bill to claim VAT at that point in accordance with a practice approved by the Revenue Commissioners.

99. Mr. Kelly was referred to the First Schedule to the Lease in relation to "*the Services*" from which services are charged on different bases at the Omni Centre and allowances are made for building annual account expenditure, estate expenditure and expenditure and the different basis for the charge inform the apportionment of charges between different tenants. Mr. Kelly was referred to the provision of the Lease which required the Landlord to furnish to the Tenant the Statement of Account together with a copy of the Centre Annual Expenditure Account and the Estate Annual Expenditure Account. It was accepted by Mr. Kelly that these had not been furnished.

100. Mr. Kelly was next referred to similar provisions in relation to the Building Charge and the Estate Charge. Although the Lease provides for certification of the different types of expenditure, Mr. Kelly accepted that certification of each type had not occurred in respect of the Property. Only one certificate had been provided for overall expenditure rather than 3 addressed to the different charges and the apportionment of same. It was put to Mr. Kelly also that service charges were not chargeable where services were not provided and were not properly due following the Tenant's departure from the Property but he did not accept this. In this regard, he was referred to Clause 7 of Part 4 of the Lease which envisages the payment of a proportionate sum for services in the event of determination of the Lease "*calculated on a day-to-day basis in respect of the said last year*" and it was put to him that this suggested a requirement to calculate services on a daily rate to the 13th of October, 2018.

101. On re-examination, counsel for the Landlord directed Mr. Kelly to Clause 4(15)(f) of the Tenant's covenants under the Lease and the provision for 14 days-notice when the Tenant has failed to reinstate the Property to the same condition as it was in when the Lease was granted. It was suggested to him that this provision did not apply to the determination of the Lease but only applied at the end of the full term of the Lease, a suggestion he did not demur from.

102. Counsel for the Landlord also revisited Mr. Kelly's evidence in relation to his email on the 17th of May, 2011, when queried about whether there was agreement to pay monthly in which he said: "*hi no formal agreement in place but did tell Conway that without prejudice we won't refuse payments*". Mr. Kelly was asked what he meant by the inclusion of the special words '*without prejudice'*. Mr. Kelly confirmed his understanding that this meant that the Tenant could not use this as evidence of a change of terms from an obligation to pay monthly to quarterly.

103. Mr. Kelly presented new figures to the Court during the course of the hearing, in which he accepted that a computation error had been made by treating rent as due from the 6th of April, 2008, rather than the 14th of April, 2008, (the rent free period), allowing a rent credit in respect of this period of time in the sum of €3,328.77, which on the basis of service and insurance charges payable until 13th of October, 2018 (and

not discounting water charges not due under the Lease), on Mr. Kelly's figures this then left a balance due at the break date of €3,699.84 (as compared with his original figure of €7,848.22). Arrears due as calculated on this basis were cleared by a payment made on the 2nd of November, 2018, in the sum of €7,579.85 with the account then showing an overpayment by the Tenant on this scenario of €3,880.01.

104. When recalled on Day 7 at the conclusion of the evidence to address matters which had not been put to him, Mr. Kelly was referred to Mr. Gordon Ritchie's intervening evidence that he had made a number of phone calls on the day of the missed inspection on the 25th of September, 2018, to arrange for Mr. Kelly and the Landlord to return for the purpose of inspecting the property. He responded to the effect that he did not recall receiving any calls or any missed calls stating, "*if I was at the centre and got those calls, I would have attended*."

105. In response to Mr. Conroy's averment that issues had been raised in relation to the computation of the service charge prior to the determination date, Mr. Kelly again said he did not recall any queries being raised prior to this date. He referred to the audited service charge certificates which had been furnished since the commencement of the hearing in July, 2024, and not previously, maintaining that he did not recall any "*specific requests*" for these earlier. He accepted that the apportionment schedules prepared had been prepared for the purpose of the hearing and in the period between the first and second hearings and had not been done for years before 2017/2018. Under cross-examination, he also accepted that there had been earlier requests for information in relation to how service charges were computed. He acknowledged that there were errors in the certificates that he had prepared, in that some figures from previous copies were carried over into the subsequent year through oversight.

106. When it was put to Mr. Kelly that the exercise that had been performed for the purpose of the resumed hearing could have been performed at the time of the original request for a reconciliation statement in October, 2018, he denied this, pointing out that the audit would not normally be carried out until several months later. He again claimed to have no recollection of the conversation with Ms. Smith, when he left her with the impression that he would come back to her with a reconciliation statement. He accepted, as he had previously, that service charges had not been calculated in

accordance with the Lease because an audited certificate had not been provided, as required under the Lease.

John McKeon, Landlord

107. The second witness on behalf of the Landlord was Mr. John McKeon. Mr. McKeon is a Shareholder and Director of the Defendant, the Landlord. In his direct evidence, Mr. McKeon confirmed that he was familiar with the background to the Lease and was one of the original signatories on behalf of the Landlord to the Lease. He was referred to various documents, including correspondence pre-lease setting out heads of agreement negotiated in anticipation of a lease and an agreement for lease and confirmed that because two separate units were being linked, it was envisaged that a large area would be cut away to provide for an opening from downstairs into the upstairs area.

108. In his evidence, Mr. McKeon confirmed protracted engagement between the parties prior to formalisation of the Lease. Specifically, planning permission was required for use as a restaurant, necessitating a planning application. There was also engagement between architects and engineers in relation to structural and design elements of work required.

109. Referring to a letter dated the 25th of April, 2008, from Jones Lang Lasalle on behalf of the Landlord to the Tenant's representative, Mr. Conroy, Mr. McKeon pointed out that outline terms for a future lease were set out in this letter. The terms identified included the annual rent of €125,000, lease term of 25 years and a ten-year break option. A rent-free period of six months was specified to be granted:

> *"from the date of planning permission for change of use to restaurant or the date of completion of leases is planning is not required."*

110. Mr. McKeon did not agree with the Tenant's contention that the Landlord's structural works were delayed, with the result that the Property was not available for

handover when it ought to have been. Mr. McKeon could not explain why the Lease was dated the 17th of October, 2008, notwithstanding a liability date of the 14th of October, 2008. He maintained that the dates were inserted by solicitors and pointed out that there is no correspondence between solicitors indicating an issue regarding dates.

111. Mr. McKeon referred further to email correspondence (notably in August, 2008, at which time the Tenant was seeking possession in September) between parties and the design team (Stephen Patterson on behalf of the Tenant and Mark Deane on behalf of the Landlord) in relation to timelines for the completion of Landlord works in order to enable Tenant works to begin, including discussion concerning the responsibility for installation of the staircase or "*vertical circulation*" which the Landlord maintained was a matter for the Tenant. In this email correspondence, it was proposed that the contractor retained on behalf of the Landlord install the stairs but that the Tenant would be responsible for payment for this work.

112. Referring to an email from Mr. Nolan, Contractor, on the 5th of October, 2008, in which he advised Mr. Ritchie for the Tenant that "*Phase 1*" of the work was complete and requesting address details for invoice, Mr. McKeon gave evidence of his understanding that Phase 1 related to the opening for the staircase. He confirmed receipt of an email from the Centre Manager (Eilish Branigan) on the 7th of October, 2008, in which she informed him that the Project Manager for the Tenant had been onsite with their contractor that morning and wished to commence fit- out the following Monday with a 5-week plan. Mr. McKeon relied on this correspondence as supporting his position that the Tenant was responsible for the installation of the staircase and premises was ready for occupation by the Tenant by the Lease commencement date of the 14th of October, 2008. In this regard, Mr. McKeon further referred to an email dated the 11th of November, 2008, in which it was confirmed that the handrail to the staircase was due to be installed and confirmation was sought by the contractor that the Tenant would be responsible for payment. The contractor queried with the Tenant's representative which company the invoice should be made out to.

113. Mr. McKeon was asked with reference to an agreement for lease dated the 17th of October, 2008, as executed by the parties, what Landlord works remained outstanding as at that date. He answered that he did not believe the Landlord had work

left to do at that time. He offered the view that the purpose of the Agreement for Lease was to allow the Tenant to commence fit-out works. Specifications for the works to be carried out appeared in the Agreement for Lease. He confirmed that the invoice which issued by the contractor to the Landlord on the 29th of October, 2008, related to works in respect of opening the void for a staircase and not the installation of the staircase itself. This invoice was noted to have been paid on behalf of the Landlord on the 3rd of November, 2008.

114. While correspondence between Mason Owens & Lyons and the Landlord's solicitors by email dated the 31st of October, 2008, showed a lack of clarity on the Letting Agent's part in relation to the commencement date for rent which solicitors confirmed as being not the 6th of April, 2008 (as erroneously noted by the Letting Agent) but the "*14th of April next*" running from the "*14th inst.*", Mr. McKeon relied on this correspondence to confirm his understanding that the Tenant was in occupation under the Lease from the 14th of October, 2008, and that the dates inserted in the Lease as formalised had been agreed between solicitors.

115. Returning to the witness box on Day 3 of the hearing, Mr. McKeon denied ever asking a Tenant to pay monthly in advance instead of quarterly, as quarterly in advance would be more advantageous for the Landlord. He acknowledged that from a tenant perspective, paying monthly instead of quarterly can be helpful to cashflow and this is sometimes requested by tenants. He confirmed that when a tenant requested to pay monthly in advance, the Landlord treated each request individually.

116. Mr. McKeon denied any agreement to vary the Lease in 2009, as had been alleged on behalf of the Tenant, but rather than the Tenant elected not to pay quarterly, without Landlord agreement. When it was put to him that a forfeiture notice had been served for non-payment of rent following financial difficulties in February, 2011, he claimed some memory of this occurring but was unsure as to the details.

117. Mr. McKeon disputed the Tenant contention made on affidavit by Mr. Conroy that the Shopping Centre had lost a large number of tenants in the summer of 2011 following the economic crash, stating that they dealt with tenants on a case-by-case basis, tried to help tenants and were successful in retaining tenancies, not losing a large number. He accepted the Tenant's contention that a meeting had been sought in or

about May, 2011, to discuss rent reduction. He agreed that he attended this meeting with Mr. Conroy and Mr. Tuli on behalf of the Tenant and that they sought a rent reduction which was refused. He indicated that he had explained to them that everyone was suffering due to the economic crash with many tenants seeking rent reductions. Mr. McKeon confirmed that he referred them to Shopping Centre bank indebtedness and the need to get bank approval for any rent reduction. He posited in evidence that bank approval would not have been forthcoming in this instance, given Tenant turnover as explaining refusal of the request for rent reduction. He disputed the Tenant contention that *in lieu* of rent reduction, the Landlord agreed the payment of rent monthly in arrears by direct debit. He explained in evidence that the Landlord maintained a policy against direct debit as opposed to standing order or cheque and a policy against payment of rent in arrears.

118. Referring to the contemporaneous correspondence from 2010, Mr. McKeon contended that the fact that the Tenant was being pursued for arrears of rent quantified on a quarterly basis was consistent with there having been no agreement in 2009, as had been alleged on behalf of the Tenant, to pay rent monthly. Email correspondence in January, 2010, confirmed a proposal on the part of the Tenant to pay monthly, but with the Landlord reiterating the need for payments in advance with reference to what a monthly rent should be but without insisting on quarterly payments in advance. He noted with reference to Mr. Conroy's statement in his email of the 28th of January, 2010, that "*it will be good to have the monthly structure in place for the time being*" as indicative of an understanding that Landlord acceptance of rent on a monthly basis was intended to be temporary. Emails throughout 2010 on behalf of the Landlord request the return of standing orders and refer to the need to get the account up to "*monthly in advance*".

119. Still in direct evidence but with reference to Mr. Conroy's Affidavit, Mr. McKeon claimed to have no recollection of a request being made for a reconciliation statement in October, 2018. He maintained that any such request would have been refused as the obligation when exercising a break option is to comply with covenants under the Lease which provided for payment quarterly in advance with a reconciliation afterwards. Where money was due back to a tenant, then arrangements could be made

to pay back any sum overpaid provided the unit had been handed over in accordance with lease terms.

120. Turning to deal with the fit-out of the Property and its condition on the break date, Mr. McKeon gave evidence that he attended for an arranged inspection on the 25th of September, 2018, at 9.30 a.m. but there was no-one there for the Tenant. He maintained that he waited with others from the Landlord team for some 15 minutes and then left to attend a meeting at the Shopping Centre, asking the Letting Agent to arrange a subsequent meeting. Mr. McKeon further confirmed that he was unable to attend the re-arranged date of the 2nd of October, 2018, but his fellow director attended and reported on inspection at the next management meeting on the 9th of October, 2018. He explained that at the said management meeting, it was decided that the Landlord wanted the Property returned to its original "*grey box finish*". He observed that tenant fit-out was not certified and therefore worthless in view of regulatory changes since the Tenant took up occupation. He suggested that they offered that the Tenant leave the glazing and stairs *in situ* as a concession, but that the Landlord wanted all other fit-out removed. He confirmed that this request was not complied with and that while seating, counters, dispensing equipment for drinks and cookers had been removed, floor tiling, wall partitioning and ceiling grid and electronics, toilets, freezers, ventilation equipment remained.

121. In Mr. McKeon's view, the Tenant had complied with its obligations to the Master Franchisee by removing KFC branded items, but not its obligations to the Landlord by leaving fit-out *in situ*. Given the historic nature of the fit-out, he considered it a liability and represented a cost to the Landlord in terms of removing it. Any potential benefits in terms of ventilation for toilet fit-out was considered by Mr. McKeon to be minor in the overall scheme of things. He expressed amazement at the Tenant response to the concession suggested, to the effect that it was not an "*a la carte*" position on the apparent premise that the stairs and windows had a value to the Landlord. Instead, he said, from the Landlord's perspective, it was a saving to the Tenant not to have to remove these fixtures.

122. In response to the contention that the requested "*grey box finish*" was late in the day and made at a time when it was not possible to do the works requested in advance

of the break date, Mr. McKeon said that this depended on the resources deployed. He said that he expected the Tenant to come back with a proposal to do certain works in advance of the break date and other works after the break date, but the Tenant did not do this. Mr. McKeon acknowledged that this could have been agreed legally through solicitors but there was no correspondence between solicitors at that time, or subsequently, endeavouring to agree works to be done by the Tenant to meet the Landlord's requirements. Mr. McKeon maintained that until the beginning of October, 2018, the Landlord was uncertain as to whether the Tenant was calling the Landlord's bluff and using the break option as a negotiating tactic. He contended that the onus was on the Tenant to engage with the Landlord to agree what fit out was to be left and what was to be removed.

123. He agreed that the Landlord had engaged Jones Lang Lasalle to let the Property following service of notice by the Tenant. This was in case the Tenant proceeded to vacate the Property in accordance with the notice given. Mr. McKeon claimed not to know the detail of the marketing efforts made.

124. Mr. McKeon denied all knowledge of the circus posters pasted to the internal door and laid across planters visible from the window of the Property, suggesting that the Tenant may have permitted same but claiming the Landlord had not done so.

125. Mr. McKeon stated that he was at a loss to understand the approach of the Tenant to the exercise of the break option given that it was a large company with an extensive property portfolio. He noted that similar tenants cease trading well in advance (two months in the example given of another named tenant) to ensure strip-out, but that the Tenant, in this instance, had continued to trade until the beginning of October, 2018, leaving itself with little time for strip-out. He added that this other tenant had offered money to walk away, leaving strip-out to the Landlord upon the determination of lease, but this had been refused on the basis that the money offered was inadequate. In the example cited, Mr. McKeon explained that the tenant had engaged in a sufficiently timely manner to enable it to complete the fit-out at the end of the tenancy when the Landlord refused money. Asked to comment on the failure to engage in a timely manner in this case, Mr. McKeon speculated that Mr. Conroy may have simply been too busy on other projects and "*dropped the ball*" leaving things to the last minute.

126. Mr. McKeon confirmed that no issue was raised by the Tenant in relation to the calculation of service charges under the Lease until after the issue of proceedings. He was referred to his emailed response to the communication from the Centre Manager (Eilish Branigan) on the 7th of October, 2008, to the effect that the Tenant wished to commence fit out the following Monday in which he confirmed that the Tenant could only commence fit-out when the Lease had been signed and advised that he would follow up with Mr. Conroy in this regard to ascertain where they were on "*the legals*".

127. Under cross-examination, Mr. McKeon did not accept the proposition put to him on behalf of the Tenant that the Property was not ready for Tenant fit-out the following Monday, as contended on behalf of the Tenant in these proceedings, pointing out that nowhere is there any suggestion in contemporaneous correspondence that the Property was not ready for Tenant fit-out by the 14th of October, 2008. He claimed to have no recollection of any issue being raised in a phone call, as suggested on behalf of the Tenant. He denied ever saying, on foot of a telephone conversation with Mr. Conroy in October, 2008, that the rent-free period would be extended, as required, until Landlord works were complete. He added that he would be unable to agree such an extension of a rent-free period in a telephone call without discussion with his co-owner. He further observed that had such an extension been agreed, it would be recorded in writing because it would require to be communicated to the Letting Agent and the Accounts Team as they rely on tenancy schedules with dates.

128. As for the discrepancy between the liability date under the Lease and the date of the Lease and when the Agreement for Lease was signed, Mr. McKeon observed that once the solicitor confirmed that she was in possession of a signed Lease, the Landlord would have allowed the Tenant in. It was pointed out on behalf of the Tenant that the documentation suggested that the Lease was not signed before the 17th of October, 2008, suggesting that the Tenant would not have been permitted entry before that date but he relied in response on the commencement date recorded in the Lease as reflecting the agreed position at the time.

129. Mr. McKeon accepted under cross-examination that there was no certificate of practical completion in respect of the Landlord works. He also accepted that by the 21st of October, 2008, when Tenant works had commenced on site, it was on the basis of

Landlord and Tenant contractors being on site at the same time. He further accepted that had there been an extension of a rent-free period agreed, the Letting Agent was dependent on him communicating this. He accepted that there was an agreement to the payment of rent on a monthly basis, but maintained while this temporary arrangement had never been revoked, it was always on a "*without prejudice*" basis. He also accepted that the Landlord never sought interest thereafter for late payment of rent and he observed that they were still experiencing tough economic times and the Landlord had an interest in maintaining a good Landlord/Tenant relationship.

130. Asked if he had been contacted by Mr. Kelly in relation to the request by Ms. Smith for a reconciliation statement, Mr. McKeon indicated that he would not expect Mr. Kelly to contact him about a trivial matter of that nature.

131. Under cross-examination, Mr. McKeon insisted that it was a matter for the Tenant to put the necessary resources in to ensure strip-out, acknowledging that when time is limited, greater resources would be required. He claimed to have no knowledge as to whether Ms. Smith was ever advised that a reconciliation statement would not be forthcoming, as he would not be copied on this type of correspondence. He agreed that the Landlord did not contact the Tenant to agree works to be done to secure possession in the condition required by the Landlord, but instead sent a letter of claim within days of the break date.

132. Put to Mr. McKeon that the Landlord pursued a strategy of frustrating the exercise of the break clause, he responded that he did not consider the break option had been validly exercised and it was a matter for the Tenant to engage with the Landlord in relation to strip- out works and not for him to speculate as to what resources they had available to ensure the work was done in time.

133. On the question of vacant possession, Mr. McKeon did not accept that keys had been handed back to the Centre Manager on the 13th of October, 2018, as "*we don't have a record of this*." He indicated that the Property had been marketed in an effort to mitigate loss and that had an alternative letting been secured at a higher rent, then "*we would not be here.*"

134. It was put to Mr. McKeon that service charges had not been levied in accordance with the Lease, a fact confirmed by Mr. Kelly in his evidence. Mr. McKeon disclaimed all knowledge in this regard, saying that this was a matter for the Letting Agent.

135. On re-examination Mr. McKeon claimed that the Landlord never received the keys back and never got the Lease back from the Tenant. He did not refer to any correspondence in which these matters had been raised with the Tenant on behalf of the Landlord.

Mr. Vincent McCullough, Deloitte LLP

136. To address the report furnished by Grant Thornton on behalf of the Tenant and in anticipation of evidence in line with the report furnished, the Landlord's VAT advisor Mr. Vincent McCullogh of Deloitte LLP gave evidence on Day 3 of the hearing (27th of June, 2024).

137. In evidence the relevant terms of the Lease for VAT purposes were identified as Clauses 1(8), 2(34), 3(1)(b), 4(1), First Schedule, Parts 1, 2 and 4. The evidence offered in relation to the VAT treatment of the service charges was that the Landlord operated what is known as the "*Landlord's Concession*" and did not issue any VAT invoices in relation to services provided, but did issue VAT documents in accordance with the Landlord's Concession. It was maintained that the Tenant is entitled to use this VAT document as a basis for deducting VAT incurred on service charges.

138. It was explained that current Revenue Commissioners' practice in relation to service charges dates back to the 30th of May, 1985. Under the "*Landlord's Concession*", service charges are not viewed as consideration for any supply of services by the landlord (the Revenue view being that there is no supply for VAT purposes) to the tenant. As there is no supply by a landlord, a landlord is, in principle, not entitled to recover VAT incurred on the relevant costs. A tenant is generally obliged to discharge the landlord's costs which would include VAT. To avoid locked in VAT costs for tenants

(i.e. VAT not being recovered by the landlord on the buy in of services and the tenant paying a VAT inclusive gross amount), the Landlord's Concession came into being.

139. From Mr. McCullough's evidence it appears that the Landlord's Concession operates as follows:- The landlord can issue a document, following year end, to a tenant reflecting the net of VAT costs of the services bought in (which were chargeable to VAT) and the VAT on same separately, and this VAT can be recovered by a tenant. A landlord is not obliged to issue VAT invoices reflecting VAT at the time a landlord receives payment from a tenant. A landlord recovers the VAT on the services bought in – again once a year following year end. A landlord reflects the VAT on the document issued to the tenant as a liability for a landlord in its VAT returns following year end. The deductible VAT on services bought in by a landlord will match the VAT liability so there is a neutral position on the VAT return for a landlord. The tenant can recover the VAT reflected on the VAT document issued by a landlord.

140. It was accepted that the Landlord Concession represented a departure from the general obligations in relation to VAT under the Value-Added Tax Consolidation Act 2010 [VATCA], together with related VAT Regulations and VAT Orders, where the normal position in relation to VAT on the supply of services is that a VAT invoice for the service charges should issue within fifteen days of the end of the month during which the payment was received by the landlord. Had this occurred in this case, then the Tenant would have recovered the VAT so reflected on such VAT invoices contemporaneously with VAT being charged. In line with the Landlord's Concession, however, in this case the practice was that the Landlords' managing agent, Mason Owen & Lyons, prepared an annual budget in conjunction with the Landlord based on prior year spend to date and anticipated future changes. This formed the basis for the amount 'demanded' quarterly by Mason Owen & Lyons from the Tenant approximately 6 weeks before each quarter/Gale Day when the amount was to be paid.

141. As regards top ups or refunds, the practice was that once a year, after the event, Mason Owen & Lyons compiled details of the actual expenditure; if there was an underspend this was credited to tenants, or if there was an overspend then tenants were billed for a balancing charge. Mason Owen & Lyons used the service charges/funds collected in advance during the year to spend on the services bought in throughout the

year. A true-up comparing actual spend with the amount of service charges collected was typically done 6-9 months after the year-end.

142. Once the true-up was completed, the VAT document *re* service charges was issued to the tenant reflecting the VAT rates applicable to the expenditure incurred. This process was repeated every year. A VAT deduction was claimed on the costs of the relevant services bought in by landlords from third parties when the VAT document issued to the Tenant. The service charges VAT document was issued by Mason Owens & Lyons on behalf of the Landlord. This VAT document reflected the landlords' VAT registration number. In this way, the Landlord accounted for the output VAT to Revenue when the VAT document issued and recovered VAT on related expenditure at the same time in the same VAT return.

143. Since the Landlord was operating the so-called Landlord's concession, it was the opinion offered by Mr. McCullough that there was no requirement for the Landlord to issue a VAT invoice for service charges paid by the Tenant within fifteen days of the end of the month, during which the payment was received in line with legislative requirements. It was his opinion that the Landlords' standard practice of issuing the VAT document following year end was in compliance with Revenue practice and the Landlord's Concession. Mr. McCullough maintained that the Landlord did not obtain any cashflow benefit to the detriment of the Tenant. It was explained that the Landlord did not have free use of the Tenant's money as regards any VAT incurred on costs for any period as same was used to discharge VAT on costs incurred. For this reason, the contention that the Tenant was consistently owed by the Landlords in the absence of the Landlords providing VAT invoices in respect to the service charges paid, or that it suffered any negative cash flow consequences arising from use of the Landlord Concession by the Landlords in dealing with VAT on service charges was rejected.

144. In Mr. McCullough's opinion, there was no improper VAT treatment of the service charges paid by the Tenant. It was a matter for the Landlord to determine the timing of the issuing of VAT documents, provided it was in accordance with the Landlord Concession/Revenue practice, notwithstanding the relevant European Union and Irish VAT legislation. In his opinion, it would have been contrary to long established Revenue and industry practice not to apply the Landlord Concession, and

would have brought with it the risk of Revenue challenge for the Landlord. It was accepted, however, that the Tenant's interpretation of obligations regarding the payment of VAT reflected Tax law, but for the concession operated by the Revenue as an administrative practice. It was pointed out that the Tenant understood the Landlord was dealing with VAT on service charges in accordance with the Landlord Concession/Revenue practice from the time it signed the lease on 17th October, 2008, and accepted this VAT treatment without making any objections during the term of the Lease/until the current proceedings.

145. In his evidence, Mr. McCullough did not seek to argue against Grant Thornton's reservations in relation to the compatibility of Revenue practice with Revenue law. Rather, his position was that the Landlord was entitled to rely on the concession afforded by Revenue and in consequence there was no legal requirement for the Landlord to issue a VAT invoice for service charges within fifteen days of the end of the month during which the payment was received. It was accepted, however, that in consequence the Tenant was prevented from offsetting its VAT expenditure in a timely manner which in turn impacted negatively on Tenant cashflow and benefitted the Landlord.

Mr. Pat Nolan, Contractor

146. Mr. Nolan gave evidence on Day 4 of the hearing (28th of June, 2024) in his capacity as building contractor routinely retained by the Landlord. He confirmed that he was involved with the fit-out of the premises and had been engaged to do structural work cutting the floor slab and installing steel for a new staircase at the request of the Landlord. He confirmed that this work was done in September and October, 2008. He confirmed that when he sent an email on the 5th of October, 2008, recording that Phase 1 was complete, he was referring to the Landlord's structural works. He gave evidence that he also did Tenant works on site and engaged with Mr. Gordon Ritchie in this regard.

147. As part of Tenant fit-out works, Mr. Nolan said that he installed a new staircase and glass for handrail as well as the handrail itself. He gave evidence that he did not fit the handrail until the 11th of November, 2008. He pointed out that he was only engaged in relation to the stairs when the opening had been made. He had not been retained to do this work from the outset. This resulted in some delay as it took time to design and construct the stairs. He confirmed his understanding that the Tenant was responsible for this work and engaged him to do the work.

148. Under cross-examination, Mr. Nolan confirmed that he had clear recall in relation to this project even though it occurred some 16 years previously. He attributed his good recall to the fact that he had not been paid on behalf of the Tenant for a year afterwards. He confirmed that his work for the Landlord was complete by the 5th of October, 2008, but he also confirmed that he was not engaged in relation to the division of the upstairs unit and his work had been confined to the installation of the staircase. He was not the only contractor working on site for the Landlord.

Mr. John Duffy, Chartered Surveyor

149. A Chartered Surveyor, Mr. John Duffy, retained on behalf of the Landlord, gave evidence on Day 4 of the hearing (28th of June, 2024) that he inspected the Property in May, 2024, for the purpose of providing a report. He gave an overview as to the typical commercial processes and remedies typically pursued by landlords and tenants to address liabilities in respect of dilapidations and want of repair, responding to a report prepared by the Chartered Surveyor engaged by the Tenant, outlining the works required to return the property to its configuration and state of repair prior to commencement of the lease (to the extent required under the terms of the lease), providing an estimate of the costs associated with the works now required. He was also instructed to prepare the Schedule of Dilapidations.

150. Mr. Duffy gave oral evidence in line with the Report he prepared on foot of instructions. He confirmed previous experience in the negotiation of terms of

settlement in respect of dilapidations and liabilities, as well as monitoring Tenant works at lease termination and acting in respect of lease surrender and break. Mr. Duffy confirmed that in his experience, liability in respect of dilapidations commonly crystalises when a lease comes to an end, either through expiry of the term or through the exercise of a break option. Once a decision is reached and the parties agree to terminate a lease, dilapidation liabilities will typically be addressed either by a tenant undertaking all works which the repairing and yield up covenants require prior to the termination date or by a landlord and tenant agreeing to negotiate a settlement of damages in lieu of the tenant completing the works. He further confirmed that where buildings are originally presented to shell and core / grey box level of specification, it is common for landlords to require the building to be returned to them in that manner.

151. Mr. Duffy confirmed in his evidence that where a tenant is performing the works, it is common for a landlord to expect that the works would be completed before the notified break date. He confirmed, however, that he was aware of situations where for commercial reasons, both parties agree to alternative arrangements to facilitate the works being completed. Mr. Duffy further confirmed that it is common for the landlord and the tenant to appoint Building Surveyors to firstly agree on the scope of outstanding works which the tenant is obliged to carry out and secondly to agree on the value of the works and consequential costs.

152. Specific aspects of Mr. Duffy's evidence which warrant special mention include his view that in contacting the Landlord on the 12th of September, 2018, with a proposal in respect of strip-out, the Tenant was late but that it was not an impossible timeframe to have a contractor appointed, insurances in place and logistics regarding working hours, access for contractors, parking, removal of debris *etc.* agreed and the works actually completed prior to the break date. He accepted under cross-examination, however, that there was little reality to the work being arranged in the four-day timeframe allowed by the Landlord's grey box request only made on the 9th of October, 2018.

153. Mr. Duffy gave evidence to the effect that there was no commercial value for the Landlord in retaining the shop fit, including the stairs and downstairs glazing. He referred to the Landlord's right to require the fit-out to be removed, as was their right

under Clause 4(15)(f) of the Lease. In this regard, he expressed his disagreement with the Tenant's expert, Mr. Fitzpatrick. He referred, in particular, to the fact that retained parts of the fit-out were maimed and damaged during the Tenant's works to remove their fit-out. He further referred to photographs which showed broken tiles and incomplete tile cover after the removal of fixtures and fittings. He offered the view that the fit-out was left in an incomplete state after the tenant "*picked and chose*" the elements that they clearly considered to be of value. He observed that the suitability of the fit-out fell to be considered having regard to the apparent absence of any safety file for the premises. Based on his inspection, he indicated a concern in respect of compliance of the completed fit-out with certain aspects of the Building Regulations. Of note, however, Mr. Duffy suggested that it is not unusual for matters in respect of dilapidations to extend beyond the determination date. Mr. Duffy prepared a detailed schedule of dilapidations to return the unit to grey box configuration and spoke to this schedule in his evidence.

154. Mr. Duffy confirmed that in his opinion, the Landlord suffered a loss arising from the failure of the Tenant to remove their fit-out or to otherwise deal with their responsibility to do so. There were a number of aspects to the loss incurred by the Landlord, including the cost to remove the Tenant fit-out. In his Schedule of Dilapidations which can be seen at Section 10 of this report, he had estimated the present-day value of the works associated with removal of the Tenant's fit-out to be in the sum of €161,522.07, excluding VAT on construction costs and professional fees. This sum included a sum for preparation of the costed schedule of dilapidations which he maintained should be recoverable from the Tenant. It was his view that the Tenant failed to plan properly for their exit from the Property and they did not allow sufficient time to complete removal of their fit-out and to address consequential want of repair.

155. Mr. Duffy identified what he referred to as "*usual mechanisms*" as to how these situations can be handled in the commercial property sector, including practices which can be pursued where a Tenant is not able to, or does not wish to, complete works before a break date. One option, said to have been facilitated by the Landlord in a case involving a different tenant, a license was granted to complete works to satisfy their obligations after the break date. This process allowed for the completion of works in an organised fashion giving reasonable time to both parties to engage and handle

queries allowing the works to be fully completed to the satisfaction of all parties. He indicated that another option might have been to negotiate a financial settlement *in lieu* of the Tenant completing the works directly. Mr. Duffy confirmed that this is also regular occurrence in the commercial property sector.

156. In sum, Mr. Duffy, gave evidence on the part of the Landlord of extensive failure on the part of the Tenant to comply with its obligation to remove fit-out inherent in Clause 6(10)(a)(ii) and (iii). Having listed in a Schedule of Dilapidations exhibited at Section 10 of his report all items of fit- out outstanding which required to be removed, Mr. Duffy estimated the present-day value of the works associated with removal of this outstanding fitout to be in the sum of €161,522.07 excluding VAT on construction costs and professional fees.

157. In response to the Tenant's expert's professed opinion that there was no obligation to remove fit- out in the absence of a notice requiring same, Mr Duffy stated that the Tenant had received a request from the Landlord to remove their fit-out entirely and had understood the meaning of that request. Accepting that the time-frame afforded by a late email on the 9th of October, 2018, made this very difficult, Mr Duffy further contended that the Tenant had failed to plan properly for their exit from the Property and did not allow sufficient time to complete removal of their fit-out and to address consequential wants of repair or to seek to avail of any of the practices which could be pursued where a Tenant was not in a position to or did not wish to complete works before a break date. Mr Duffy offered evidence of his conclusion that the Tenant had therefore made no meaningful effort to remove their fit-out in a timely and reasonable manner.

Mr. Aidan Ringrose, Chartered Surveyor

158. Mr. Aidan Ringrose, Chartered Surveyor, was also called to give evidence on behalf of the Landlord on Day 4 of the hearing in respect of the apportionment of service charges under the Lease, most specifically in light of the report prepared by Eoin Conway for the Tenant dated the 4th of February, 2024. Through his evidence,

Mr. Ringrose sought to respond to the concerns raised by the Tenant in relation to the calculation of service charges. He laid emphasis on the fact that the service charge percentage is stated in Clause 1(8) (b) as 28.5199%, which is the percentage liability used in the apportionment schedule. He confirmed that he was advised by Mason Owens & Lyons that there is no measured survey of the Shopping Centre. In his view, a detailed measured survey was not required as the Tenant's percentage liability is stated in the Lease.

159. With reference to the Apportionment Schedule, he observed that the weighting applied in it reflects appropriate discounts from large space users such as the Tesco supermarket, Penneys department store and the Cinema. He noted that a weighting is also applied to the first-floor mall units in the centre and offices over the boardwalk to reflect their secondary location, lower footfall, and lower use of service. He accepted that a delay of six months in issuing the Audit Certificate may not be best practice, but contended that it is not in breach of the Lease. It was his opinion that the service charge was apportioned in a fair and equitable manner across all occupiers in the Centre. He noted that the current charge of €5.20 per square foot for the premises is half the rate of €9.97 charged to the internal ground floor mall units. He considered this to reflect the fact that costs are apportioned on a fair and reasonable basis as the service charge for the premises was at half the rate charged to the internal mall units.

160. Mr. Ringrose's evidence addressed the weighted formula used in the Apportionment Schedule and he emphasised both in his written report and oral evidence. It was Mr. Ringrose's view that measurement was unnecessary as the Tenant's percentage liability was stated in the Lease. It was further his evidence that as far as he was aware, the 2018 apportionment schedule had never previously been requested, but could be provided. He confirmed that he had been advised by Mason Owens & Lyons that they had provided the Tenant with copies of the Audit Certificates for years ending 30th September 2020, 2021, and 2022 on the 15th of September, 2023, but that there was no separate certificate for the Estate, Centre and Building. It was his understanding that the Auditors provide a Certificate of Expenditure for the entire property, which is apportioned between the Estate, Centre and Building and the Apportionment Schedule clearly shows the split between the Estate and Building

service charges for which the tenant is liable. Mr Ringrose stated that the Estate and Building charges are clearly set out in the apportionment schedule, with 0.79% being the percentage of the total Centre Estate and Building expenditure charged to the premises, and the current charge of €5.20 per square foot for the premises being half the rate of €9.97 currently charged to the internal ground floor mall units.

161. Mr Ringrose concluded, by way of response to Mr Conway and Mr. Musson's reports on behalf of the Tenant that, in his view, the service charge was apportioned in a fair and equitable manner across all occupiers in the Centre.

Tenant's Evidence

Michael Conroy, Tenant Representative

162. The first witness called on behalf of the Tenant was Mr. Michael Conroy. He is a qualified chartered surveyor and was a former employee of Mason Owens & Lyons, the Letting Agents engaged in respect of the Property. He joined the Tenant in 2004 and has been involved in looking after an extensive portfolio of retail units since then. His referred to his prior relationship with the Letting Agent and others involved in the Omni Shopping Centre as a factor in the shaping of the deal which led to the Lease agreed between the parties.

163. Mr. Conroy pointed out that the unit did not exist in its current form when negotiations commenced and both planning permission and structural works were required for the unit to be used for food and beverage or restaurant purposes, including the merger of upstairs and downstairs units. He said it was unusual for a tenant to be responsible for the installation of a stairs and that this requirement on the part of the Landlord had led to blurred lines in relation to timescales and who was responsible for doing what in terms of readying the Property for occupation.

164. Mr. Conroy indicated that several proposed handover dates were missed because the Property was not ready for Tenant occupation. He confirmed that by the 14th of October, 2008, the Tenant's contractors, who were travelling from the UK, were

keen to start work but no Lease had been signed, no rent had been paid and Landlord works were outstanding with dissent between Mr. McKeon and Mr. Kennedy in relation to the works to be carried out by the Landlord. He maintained that Tenant works did not commence until the 21st of October, 2008, when access was granted following the formalisation of Lease documentation. He complained that at that stage, no certificate of practical completion was available. He maintained that for a time the Landlord's contractor remained on site together with the Tenant's contractors because Landlord works were not complete.

165. Mr. Conroy accepted that the Lease provided for a rent commencement date of the 14th of April, 2009, but stated that he did not check to see if an extension had been allowed in respect of delayed Tenant occupation due to outstanding Landlord works but proceeded on trust that rent due was calculated correctly. He accepted that the service charge commencement date differed from the rent commencement date and that service charges were due from the date of occupation. He confirmed his understanding that in billing for rent, the Letting Agent would reconcile from the rent commencement date to the next Gale date.

166. Asked about how trade progressed, Mr. Conroy stated that it was not as expected and business in the centre was in decline with fast food representing a discretionary spend, affected by the economic decline. He said he had discussions with Mr. Kelly in or about October/November, 2009, in relation to market decline. At that time there was widespread default on rent payment. Accordingly, in Mr. Conroy's evidence a prudent approach was taken that rent be accepted monthly on the basis that it was not possible to collect it quarterly. Mr. Conroy confirmed that during this time, the Tenant was being billed quarterly, but paying rent monthly. He referred to a temporary agreement to payment of rent monthly, as evidenced in the emails, in January, 2010, and confirmed that no-one ever contacted him to say that agreement was revoked. He added that he had a strong sense that the unit was over rented and was not affordable. For this reason, an alternative arrangement was sought to make life easier.

167. Mr. Conroy referred to the meeting in June, 2011, with Mr. McKeon in the presence of Mr. Tuli who flew to Ireland for the meeting. A forfeiture notice had been served in early 2011 by reason of arrears and it was considered that rent levels were not

sustainable. Reductions in rent had been agreed with other landlords. Mr. McKeon was not agreeable to a rent reduction because of the precedent it would set and problems in terms of the Bank's involvement, but he was prepared to consider variations to permit bolder signage in ease of attracting business and payment of rent electronically on a monthly basis and without the Tenant being chased in respect of arrears once monthly payments were being made. This was not the outcome the Tenant had hoped for , as according to Mr. Conroy, it had wished to secure a rent reduction as trading conditions were so difficult. The fashion business, also operated by the Tuli interest, went into voluntary liquidation.

168. Despite these difficulties, from 2011 and for the remainder of its occupation, the Tenant paid rent monthly electronically on the first Monday of each calendar month. Although invoices continued to be presented quarterly, payment was not chased on this basis and there were no further emails in relation to arrears of rent or forfeiture notices sent and no attempt was sought to pursue interest in respect of rent not paid quarterly in advance.

169. While continuing to pay €125,000 per annum, Mr. Conroy gave evidence that the Tenant decided that the costs of the business were excessive and reflected pre-bust economics and by 2016/2017. Accordingly, it decided that it would exercise the break option available under the Lease. Mr. Conroy indicated that the Tenant was surprised to receive no response or acknowledgement of its letters giving notice of an intention to rely on the break clause. Although the Landlord was not in touch, the Letting Agent made some enquiries as to the Tenant's intentions and Mr. Kelly was made aware of the Tenant's position that the tenancy was not viable. He suggested a new location within the Shopping Centre and the Tenant considered a "*drive thru*" option on foot of these suggestions but rejected it on the basis that the capital costs were too great. He was also asked whether the Tenant would be amenable to stay at a reduced rent if the Landlord were prepared to reduce rent at this stage, but this was not of interest to the Tenant.

170. Following the service of the notice of intention to rely on the break clause, Mr. Conroy also confirmed that he received expressions of interest from agents for other restaurant chains and that he was positive in his response to these calls. As all

expressions of interest related to food and beverage businesses, it was considered that non-branded fixtures and fittings were likely to be attractive to a successor tenant as had proved to be the case in other instances where it had departed a premises and a new food and beverage business took up occupation using 70% of existing fixtures and fittings, but changing signage. Mr. Conroy confirmed that leaving fixtures and fittings which could be useful to a successor tenant was not a big deal for the Tenant and that it had engaged with the Landlord in these terms.

171. In his email of the 12th of September, 2018, to Mr. Kelly, Mr. Conroy referred to discussions to date and attached a Green Plan outlining the fixtures and fittings it was proposed to remove and confirming that it proposed leaving the stairs and walk in chiller and freeze *in situ* as these might be useful to a prospective tenant. He commented that he sent this email in circumstances where there had been little engagement from the Landlord as to what they wanted taken out or left *in situ* and no schedule of dilapidations had been served, as routinely occurs and the email was intended to get clarity as to the Landlord's position. It took a week for there to be any response to this email but by email dated the 19th of September, 2018, a request for inspection was made. The 25th of September, 2018, at 10 a.m. was requested and Mr. Conroy confirmed that he could not be there himself as he was due to be in London but that he would check with Mr. Ritchie. He then confirmed that this was in order, however, on the 24th of September, 2018, Mr. Kelly emailed again to request the earlier time of 9.30 a.m. as the Landlord had another meeting. By return email, Mr. Conroy confirmed that this would be facilitated and that they should ask for Fiona Cooke as she was the person based in Dublin. Mr. Conroy confirmed that he only became aware the inspection did not take place on the evening of the 25th of September, 2018.

172. Mr. Conroy's next interaction with the Landlord in relation to this issue was an email from Mr. Kelly on the 27th of September, 2018, in which he advised that all contractors involved in the strip-out must have their insurance approved in advance with site specific indemnity. Mr. Conroy confirmed that he viewed this as a positive development as Mr. Kelly had the Green Plan with the Tenant's proposals for strip-out and the question of insurance indemnity was tied to the nature of strip-out works proposed, suggesting that the Green Plan was acceptable and indemnity could be put in place on this basis as no objection or contrary position was expressed. There followed

engagement by email between the Tenant's contractor, Mr. Daly and the then Centre Manager, Ms. Coady, in relation to insurance indemnity which was provided and approved based on the strip-out as proposed by the Tenant in line with the Green Plan furnished on the 12th of September, 2018, with approval communicated by email on the 4th of October, 2018, and strip- out work commencing that same day.

173. Resuming his evidence on the 2nd of July, 2024 (Day 5), Mr. Conroy was referred to the email sent on behalf of the Landlord on the 9th of October, 2018, requesting a grey box strip-out and asked what his reaction to the email was. He said he was surprised by the email because at that point stripping out work was being undertaken on the basis of a proposal for which an indemnity had been provided and approved by the Landlord in line with a plan furnished a month earlier. The email was therefore late in the day and the request for a grey box strip-out was ambiguous, with no reference to what precisely the Landlord wished to have removed and whether the Landlord was requesting the stairs and glazing to also be removed. He replied immediately to confirm his understanding that this would include the removal of stairs and glazing. He wrote by email in further detail the following day setting out that the new position was very "*late in the day*", not satisfactory and in the context of the dates and that strip-out would proceed as contemplated in discussions up to that point and "*works beyond that will be, after the break date and by agreement*". He added that works now suggested included the ground floor shop fronts and the stairs. On Mr. Conroy's evidence this prompted a telephone call from Mr. Kelly, in which he mooted leaving the glazing and staircase *in situ* but there was no communication as to this made in writing.

174. Mr. Conroy confirmed completion of strip-out works in accordance with the Green Plan by the 13th of October, 2018, and the return of the keys to Centre Management by AV Services. Mr. Conroy referred to the recent schedule of dilapidations prepared on foot of an inspection on behalf of the Landlord in 2024, rather than in 2018 as it should have been. He pointed out that fixtures and fittings left *in situ* might require to be stripped out in 2024 following the passage of 6 years but would not have required stripping out in 2018.

175. Next asked about industry practice in relation to reconciliation and closing statements, Mr. Conroy confirmed that normally on service of a break notice the managing agent on a multi-led scheme produces a closing statement. It was pointed out that the letting agent has duties both to the Landlord and the Tenant and the service of a closing statement brings clarity to the situation. Mr. Conroy stressed that the Letting Agent in this instance never made clear when asked for a reconciliation statement that it would not be provided and suggested that this was a breach of the Letting Agent's duty to the Tenant.

176. Asked to comment on payments made on behalf of the Tenant on the 2nd of November, 2018, after the break date, Mr. Conroy said this was accounts department liaison and he did not attach any significance to it.

177. In relation to the circus posters prominently displayed in the Property, Mr. Conroy explained that he saw them on an inspection with Mr. Eoin Conway arranged with the Letting Agents in September, 2023. He said it was obvious to them that there had been access to the Property for the purpose of displaying posters. He considered this to be a form of commercialisation of the unit by allowing it to be used for advertisement. He was referred to the Landlord's explanation for the posters communicated through a letter from its solicitor, in which it was suggested that the posters were posted by sliding them between a gap in the glazing. He said this fantastical explanation suggested that the posters were present on the Property by a form of "*circus trick*" and this was surprising given the location of the posters. He confirmed that for his part, he had not given permission for the erection of posters and he rejected as outrageous the suggestion that the Tenant might engage in such activity.

178. Mr. Conroy further confirmed his understanding that he was the only member of the Tenant's staff to have gained access to the unit between 13th of October, 2018, and the current day and this was by prior arrangement with the Letting Agent for the purpose of inspection with an expert for the purposes of this litigation in September, 2023.

179. When asked about the Tenant's issues in respect of the calculation of service charges, Mr. Conroy maintained that there had been discussions about the level of service charges, which in original discussions at the commencement of the tenancy

were estimated at being circa €8,000, with initial bills exceeding this at circa €11,000 per annum and growing to €14,000 per annum and laterally exceeded this figure. He maintained that the Tenant had queried the level of service charge and sought a breakdown, but that information had not been forthcoming. He articulated concerns in relation to apportionment on the basis of his understanding that the majority of spending was on the Shopping Centre itself which had required repairs to its roof. He noted the acceptance by Mr. Kelly in his evidence that the Landlord had not prepared separate accounts for the building centre and the estate and that an accounting exercise compliant with the terms of the Lease had not been carried out. Mr. Conroy offered evidence of his belief that the Tenant was overcharged in consequence and that as a result charges levied over the years were all incorrect. Quite apart from his contention that the overpayment made should be off set as a credit, Mr. Conroy also placed reliance on the fact that this impacted on the ability to accurately calculate Tenant liabilities under the Lease at the break date.

180. Mr. Conroy made a similar point in relation to the approach taken to VAT treatment by the Landlord. Referring to Grant Thornton's evidence on behalf of the Tenant in relation to VAT treatment, he noted that there were two adverse impacts for the Tenant. Firstly, cashflow was impacted because the Tenant was delayed in relation to reclaiming VAT charged in respect of services but secondly, the approach taken adversely impacted the ability to reconcile an account when VAT elements were not known until some six months after the year end. It was his evidence that the delays in relation to VAT were unacceptably long from the Tenant's perspective.

181. In cross-examination, Mr. Conroy's attention was drawn to the covenant to reinstate at the end of term under Clause 4(15)(f) of the Lease. He acknowledged that he was aware of the covenant and an obligation to repair if required to do so by the Landlord. Next, his attention was drawn to the requirement to pay rent up to date of determination under the break clause contained in Clause 6(10)(ii), the terms of which he acknowledged. He confirmed that it was his position that the Tenant had discharged its obligations under the Lease as regards reinstatement, payment of rent and provision of vacant possession. He referred to the Tenant's belief that payments were up to date, the lack of clarity on the part of the Landlord and a failure to provide reconciliation in advance of the determination date despite undertaking to do so and the improper

approach taken in the Landlord's calculations evidenced in its mistaken treatment of the end of rent-free period.

182. When asked why payments were made on the 2nd of November, 2018, if rent and charges were up to date on the 13th of October, 2018, Mr. Conroy maintained that these payments were made by mistake or related to other properties. He relied in this regard on the fact that the Landlord's figures were based on mistakes as to the end of the rent-free period which he contended extended not to the 14th of April, 2009, as noted in the amendment to the Lease but to the 21st of April, 2009, having regard to the Tenant's evidence that the Property was not available for Tenant occupation until the 21st of October, 2008, and it had been verbally agreed that the agreed six-month rent-free period would run from the date of occupation. When challenged as to the absence of a written record of Tenant occupation and consequent liability only from the 21st of October, 2008, Mr. Conroy referred to the fact that the Agreement for Lease was dated the 17th of October, 2008, pointing out that the said Agreement was signed after the date the Lease was meant to start and refers to outstanding formalities and Landlord works.

183. Whilst he acknowledged a liability date in the Lease of the 14th of October, 2008, Mr. Conroy maintained that the Lease was signed on the express "*instruction*" that this was not correct. When it was put to him that the Lease he signed showed the liability date clearly and was not amended to read the 21st of October, 2008, Mr. Conroy replied that when signing he only had the back pages. He explained that handover had been delayed and they were keen to get in to commence fit-out works so that they were ready for pre-Christmas trade.

184. When challenged as to why he would sign the back page without seeing the rest of the Lease, Mr. Conroy said it was "*a different time in Ireland*". He maintained that the extension of the rent-free period was agreed orally with Mr. McKeon on the 14th of October, 2008, when the Property was not ready for occupation. He said the full copy of the Lease was not received until sometime in Spring, 2009. He accepted that the Tenant was bound by the Lease even though he signed the back page without a full copy of the Lease being available to him, but contended that the Tenant was not bound by the rent commencement date.

185. When asked why the issue was not raised when the Lease became available, Mr. Conroy said he thought the Letting Agent would do a reconciliation on the application of a correct rent-free period. He was uncertain as to when he noticed the error in the Letting Agent's calculations, but added that when they determined the Lease the Tenant considered it had zero balance outstanding. However, when the Landlord made its claim several days later, the differences in their respective figures became apparent.

186. Mr. Conroy was challenged under cross-examination in relation to inconsistencies between his Affidavit and his oral evidence, most notably in relation to his contentions that there was agreement in 2009 to payments monthly in arrears and subsequent agreement to pay monthly by direct debit in 2011. Mr. Conroy sought to explain these inconsistencies by saying that discussions in 2009 were with the Letting Agent on a without prejudice basis, but were not properly actioned with the position being put on an agreed, open footing in the discussions with John McKeon in 2011.

187. Although asked in relation to his contention that there had been agreement to pay monthly in arrears asserted on affidavit but not expressed in any of the contemporaneous correspondence, Mr. Conroy made no clear response. He seemed to stand over his averment that the agreement was to pay in arrears. He subsequently explained that when rent is paid monthly at the beginning of the month, then it was in arrears on the second day of the month where the requirement under the Lease was to pay quarterly in advance. His evidence as to why he would state on affidavit that he was hesitant about paying monthly as this was not convenient from an accountancy perspective, when his emails confirm that he was seeking monthly payments, was also unclear.

188. Under cross-examination on the removal of fit-out issue, Mr. Conroy referred to the lack of engagement from the Landlord, the Tenant's attempts at engagement and willingness to respond to Landlord requirements and its understanding that leaving some restaurant infrastructure in place (as occurred in other locations) would be beneficial to the Landlord, the failure to provide a schedule of dilapidations in 2018, signing off on proposed strip-out in accordance with Green Plan for insurance purposes before resiling from this with only days to go to the break date. He pointed out that

while the Green Plan was furnished by email by the Tenant on the 12th of September, 2018, discussions had been ongoing prior to this date. As for the fact that works had not been done by agreement after the break date, Mr. Conroy stated that the option to seek this lay with the Landlord in response to his email of the 10th of October, 2018, but the Landlord did not seek to agree a schedule of works to be carried out by the Tenant in response to this invitation.

189. Mr. Conroy was challenged in relation to his evidence that service charges had increased across the term of the Lease with reference to the actual figures which showed small fluctuations up and down. He was also asked about when issues regarding service charges and VAT had been raised before the end of the Lease. He was unable to refer to specific documents before the Court in this regard but maintained that issues had been raised.

Fiona Cooke, Director of Operations

190. Ms. Fiona Cooke gave evidence on behalf of the Tenant on Day 5 of the hearing before me (2nd of July, 2024). Her day-to-day involvement with the Tenant is as an operational director and she has no normal involvement with leases or break clauses. In September, 2018, however, she confirmed that she was asked to meet representatives of the Landlord on the 25th of September, 2018, to facilitate inspection of the Property, go through the Green Plan as previously discussed, prior to the Tenant leaving the Property in circumstances where others were unavailable to attend the meeting. She confirmed that she recalled the day and that she noted that the meeting had been scheduled for 10 a.m. but was brought forward to 9.30 a.m. She confirmed that the time change did not present an issue for her and that she was travelling from Ongar, Dublin 15 on the morning in question. She said that on the morning of the 25th of September, 2018, she got a phone call before 9.30 a.m. as she exited the M50 to say that the Landlord was outside the unit and there was nobody there. She confirmed that she rang the keyholder who said she was running late but would be there within ten to fifteen minutes. When Ms. Cooke arrived at the premises, it was her evidence that the

Landlord was not there. In her evidence she confirmed that she was there for 9.30 a.m. as had been agreed.

191. As she did not have contact numbers for the Landlord, Ms. Cooke confirmed that she rang Mr. Gordon Ritchie, Head of Facilities, so that he could follow up in relation to the conduct of the inspection. Having waited and when no-one attended for the inspection, she went to the Landlord's Management Suite around 10.30-10.45 a.m. and was told that the Landlord was in a meeting and would come back to the Property when the meeting ended. She was given the same message after lunch. She waited until close of business but no one arrived. She clarified that on attending at the Landlord's Management Suite before and after lunch, she spoke with a security guard who went off to make enquiry and returned to tell her that the Landlord would be back over when the meeting ended.

Gordon Ritchie, Head of Facilities for the Tenant

192. In his evidence, given remotely, Mr. Ritchie confirmed working with the Tenant. Mr. Ritchie has been involved in project managing new property for some 20 years. He deals with management of construction work, fit-out and getting stores ready for opening, following hand-over from the Landlord. In relation to KFC stores, he deals with KFC approved contractors. Giving his recollection of the fit out of the Property, Mr. Ritchie confirmed delays with an initial handover date of the 22nd of September, 2008, being missed, as well as subsequent dated of the 6th and 13th of October, 2008. He confirmed that the Property was not ready for handover until the 22nd of October, 2008, as the main contractor on site had not finished on time and the stairwell opening was not ready for stairs to be put in. He referred to a site visit on the 7th of October, 2008, when works were not complete. Again, works were not completed on the 13th of October, 2008, but had been completed by the 21st. He noted that his contractors could not be on site as the Lease had not been signed and there were insurance issues with more than one contractor being on site.

193. He described his normal practice in relation to strip-out which usually occurs in agreement with the Landlord. In this case, he furnished the Green Plan to Mr. Conroy proposing a strip-out consistent with practice in other units. On receipt of this plan, Mr. Kelly on behalf of the Landlord made contact seeking an inspection proposed for the 25th of September, 2018. As neither Mr. Ritchie nor Mr. Conroy were available that date, it was arranged that Ms. Cooke would be present. He recalled that the meeting was originally scheduled for 10.00 a.m. but that the Landlord requested an earlier meeting at 9.30 a.m. and this was agreed. He confirmed that he got a call about 9.20 a.m. on the morning of the 25th of September, 2018 saying that the Landlord's representatives were outside the Property but there was no-one there. From contact with Ms. Cooke, he established that she was about 10 minutes away. Mr. Kelly told Mr. Ritchie that the Landlords were in a meeting for the rest of the day but would return later that day. Mr. Ritchie confirmed further attempts to make contact with Mr. Kelly during the day as Ms. Cooke was waiting for them to come back but he got not answer.

194. Mr. Ritchie explained that when the inspection did not occur as planned, the Tenant continued to make arrangements for strip-out in line with the proposal furnished in their "*green plan*". A contractor was retained and the contractor liaised with Centre Management in relation to insurance. He was aware that it took some time to get insurance signed off on by Centre Management, but the position in this regard was resolved on the 4th of October, 2018, leaving just 10 days to the break clause which was sufficient for the purpose of the proposed strip- out. He was asked how long a "*grey box*" strip-out would take, he indicated that if this involved removal of shop front and stairwell that a 2- or 3-week period would be required but that there would also have to be insurance indemnity in place which might also take time to secure.

195. When asked for his reaction to the email from Mr. Kelly on the 9th of October, 2018, expressing the Landlord's "*grey box*" strip-out requirements, Mr. Ritchie confirmed that he was surprised and wondered why they were sending the email so late in the day. As the request was so late, it was not possible to achieve a complete strip-out in the time remaining.

196. Under cross-examination, Mr. Ritchie recalled meeting Ms. Branigan, the then Centre Manager on the 7th of October, 2008, when they talked about site rules. He said

the meeting proceeded on the basis that the works would be complete by the end of the week but had not yet been completed. Mr. Ritchie maintained that the opening for the stairwell had not started on the 7th of October, 2008. Other than that, he was not specific in relation to what other works remained to be done.

Stephen Patterson, Burns Design

197. Mr. Patterson was called to give evidence on the Day 6 of the hearing before me on the 3rd of July, 2024. He outlined his background in commercial interior design and his focus on hospitality. He has worked professionally with the Tenant in various refits for KFC and Pizza Hut since the mid-2000s. His area of responsibility is overseeing fit-outs and refits. He recalled that this project involved the fit-out of a KFC outlet following the joinder of two separate units on two separate floors. He recalled meeting Mr. Nolan on site a couple of times and recollected that there were delays in securing handover of the Property with an original, proposed handover date around mid-September, 2008, being missed and the date moving to the 13th of October, 2009. He gave evidence that the reason for delay was the fact that the opening for the unit was not done. He returned to Dublin on the 20th of October, 2008, at which point the Landlord's contractor was doing edging and trimming works which were completed by the end of the day in time for tenant fit-out commencement on the 21st of October, 2008.

198. Mr. Patterson also confirmed that it was he who had prepared the green plan in relation to the proposed strip-out for the Property in 2012. He explained that while he marked out on the drawing what KFC wanted removed, he himself was not involved in discussions with the Landlord. He confirmed that the green plan was created from an existing Plan with shading put in and that shading was varied through discussions with Mr. Conroy over the summer of 2018 before the version sent by email on the 12th of September, 2018, was finalised.

Mr. Ger Holliday, Amesto Global

199. Mr. Ger Holliday, Chartered Accountant of Amesto Global, was also called on behalf of the Tenant on Day 6 (3rd of July, 2024) to give expert accountancy evidence with respect to the payments of rent, service charge and insurance during the 10-year period of the Tenant's occupancy. He gave evidence largely in line with a detailed written report. Mr. Holliday's brief had been to assess how much was due to be paid throughout the term of the Lease from the 14th of October, 2008, to 13th of October, 2018, and how much was actually paid.

200. Mr. Holliday's evidence was offered based on key assumptions (some of which are disputed facts in these proceedings) which included the fact that the Tenant was denied access until the 21st of October, 2008, in consequence of which it was assumed the rent-free period of the lease was extended by one week to six months and a week from the 14th of October, 2008. It was further assumed that the Tenant should not have to incur insurance costs and service charges for the week that they were denied access. It was noted that final payments were made after the 13th of October, 2018 (on the 2nd of November, 2018) but these were not included in addressing the position as at midnight on the 13th of October, 2018.

201. Mr. Holliday confirmed that he based his calculation of assumed charges for the period from the 1st of October, 2018, to the 13th of October, 2018, on the rent invoice dated the 1st of October, 2018 (Statement of Account of that date) being the rent charge from the 1st of October, 2018, to the 31st of December, 2018, and a service charge invoice also dated the 1st of October, 2018, being the service charge from the 1st of October, 2018, to the 31st of December, 2018.

202. Based on these assumptions and calculating rent and service as being due only from the 21st of April, 2009, up to the 14th of October, 2018, he calculated that there was an overpayment under the Lease in the amount of €638.75. This figure was arrived at following a detailed review of bank statements and a reconciliation with invoices.

Jarlath O'Keeffe, Grant Thornton Ireland

203. Jarlath O'Keeffe from Grant Thornton was called on behalf of the Tenant to deal with the VAT issue on Day 6 of the hearing before me. He spoke to a document entitled "*VAT Opinion on timing of service charge invoices*" dated March 2024 which had been prepared by him on behalf of the Tenant.

204. In its VAT Opinion as there set out, Grant Thornton takes the view that there was a supply of services by the Landlord to the Tenant and that the service charges paid by the Tenant represented payment of consideration for such supply. It then considered the relevant VAT legislation as regards the issuing of VAT invoices by the Landlord to the Tenant in the context of such a supply, whereby VAT invoices would be issued in line with service charge payments, with the Tenant deducting VAT reflected thereon, and the Landlord recovering the VAT incurred on their costs on an ongoing basis. In his evidence, Mr. O'Keeffe sought to support the Tenant position in these proceedings that it was impossible to reconcile service charge as of the 14th of October, 2018, because the VAT invoices for service charge year 1st of October, 2017, to 30th of September, 2018, were not available until April 2019. The report alleges that the Landlord's actions in this regard were in contravention of VAT law and had damaging cashflow consequences for the Tenant.

Mr. Eoin Conway, Chartered Surveyor

205. Mr Eoin Conway of Eoin Conway & Associates, Chartered Surveyors, gave evidence on behalf of the Tenant on Day 6 of the hearing before me (3rd of July, 2024) that in the absence of certain documents and information, he *"cannot avoid the suspicion"* that the service charges levied by Mason Owen & Lyons are incorrect. Mr. Conway's professional background, like Mr. Conroy's, included a period working with Mason Owens & Lyons, the Letting Agent. The outstanding documents specified by Mr Conway were as follows:

(i) the measurement surveys for Omni Park Shopping Centre;
(ii) the 2018 service charge apportionment schedule (provided subsequently in advance of a resumed hearing in December, 2024);
(iii) the weighted formula used in the Apportionment Schedule; and
(iv) the certified Centre, Estate and Building Annual Expenditure Accounts.

In circumstances where certified Centre, Estate and Building Annual Expenditure accounts are not prepared separately, as confirmed by Mr. Kelly's evidence and required under the terms of the Lease, then Mr. Conroy's position was that it was impossible to determine whether the Tenants have been overcharged service charges.

Mr. Frank Fitzpatrick, Chartered Surveyor

206. Mr Frank Fitzpatrick, Chartered Surveyor of Frank Fitzpatrick Building Surveyors was called to give evidence remotely on behalf of the Tenant on Day 6 of the hearing, but due to technical difficulties was unable to continue his evidence. He was then examined as to his evidence at a resumed hearing date in December, 2024. He explained that he has experience working in dilapidations with both landlords and tenants but has principally dealt with landlords.

207. Asked in relation to the usual practice in relation to dilapidations, he explained that it would be normal for a landlord to serve a schedule of dilapidations months before the determination date (between 3 and 6 months). When acting for a tenant, the norm is to await service of same by the landlord. He pointed out that there was no express, automatic obligation to remove fittings under the terms of the Lease which is the subject of these proceedings.

208. Mr. Fitzpatrick confirmed having inspected the Property in February, 2024, and he prepared a report on foot of this inspection in which he referred to photographs taken during his inspection. Mr. Fitzpatrick's evidence was that in the absence of a formal

notice to reinstate the Property, the Tenant was not obliged to remove fit-out on the basis of a late request by email on the 9th of October, 2018. In this regard, he referred to the requirements of the Lease in relation to the service of notices. He also confirmed his view that the Tenant was not given sufficient opportunity to comply with the Landlord's requirements regarding the removal of fit-out. He confirmed that elements of the Tenant fit-out left *in situ* would be beneficial to a food and beverage outlet e.g. toilets, ventilation, kitchen, while other elements would be universally beneficial e.g. shop fronts and the staircase.

209. He observed that the term "*grey box*" was not defined in the Lease and was not a universally known term, with the result that the request was vague and subject to interpretation. If the intention was to require the unit to be stripped back to shell and core standard, it was his view this could have been completed in 2 weeks if a contractor were geared up and ready to hit the ground running, working multiple shifts *etc.* His evidence was that he considered the approach taken by the Landlord in this case to be very unusual. Where it is apparent that a dispute is going to materialise, the first step should be to instruct a surveyor to inspect and produce a schedule of dilapidations to protect the Landlord's position. It is unhelpful and less than ideal to produce such a schedule several years after the property is vacated as occurred in this case. He observed that the Landlord had the opportunity to serve a notice requiring reinstatement, affording 14 days to comply with that request under the terms of the Lease and this could have been done at any time within the 17 months. This led Mr. Fitzpatrick to question the Landlord's motivation in leaving its request so late. In his view it was physically impossible to comply with a vague, informal email with unknown terms within a matter of days.

210. Mr. Fitzpatrick pointed out that when Mr. Duffy inspected the building in 2023 for the purpose of preparing his Schedule of Dilapidations some 5 years had passed following expiry of the Lease /determination date. There was evidence of the Property being accessed and its condition deteriorating during this period as clear from presence of promotional material and vermin. The condition of the Property changed during the intervening period with standards diminishing and finishes fading. Mr. Fitzpatrick repeatedly returned in his evidence to the fact that there was no obligation on the Tenant to remove fit-out under the Lease unless properly required to do so by the Landlord in

accordance with the terms of its Lease. In such circumstances, it was his evidence that many tenants would not take the initiative in engaging with Landlords on the basis that it was for the Landlord to make its requirements known in accordance with lease provisions.

Ms. Katie Smith, Accounts Manager

211. The Defendant's employee, Ms Katie Smith, gave evidence in her capacity as accounts manager working for the Tenant for several years. She had been appointed senior management accountant in 2015. She confirmed that she had worked previously in cases involving determination of a lease on foot of a break clause. She confirmed that her role as account manager working with the Tenant in 2018 in relation to termination of leases was to ensure that there was no outstanding balance. Her practice in this regard was to get closing statements prior to the break date thereby allowing a reconciliation to be done by both sides. Normally, in her experience, closing statements are provided on behalf of the Landlord prior to the break date.

212. When asked in relation to her experience of working with Mr. Kelly from Mason, Owen & Lyons, she confirmed that her contact with him related to receiving invoices. She confirmed contacting him in September, 2018, to seek a closing statement. From her telephone records she confirmed that she spoke with Mr. Kelly on the 26th of September, 2018. The call lasted 4 minutes and 39 seconds. The purpose of her call was to seek credits and reconciliation in a final statement of account in view of the imminent determination date.

213. She said that Mr. Kelly professed to not know about the exercise of the break option and said he would contact the Landlord in this regard. He confirmed to her that insurance rent and service charge in respect of any period after the 1st of October, 2018, would only be payable up to the break date and only upon the furnishing by the Plaintiffs of a reconciliation statement.

214. She was referred to an email from one Mr. Gary Taffe dated the 3rd of October, 2018 stating:

> *"please find attached statement of account, can you please arrange for payment for the amounts outstanding."*

215. The Statement of Account attached was for a full quarter from October to December, 2018. On receipt of this statement of account for the quarter October-December 2018, Ms. Smith confirmed that she immediately replied by return email because the invoice had not been adapted to reflect a determination date of the 14th of October, 2018, as discussed with Mr. Kelly, but instead billed for the entire quarter. She read her response to the email from Mr. Taffe into the record. In her responding email dated the 3rd of October, 2018, she said:

> *"I am awaiting a credit for the period 15th of October-31st of December, 2018 as our lease ends on the 14th of October. I spoke to Paul Kelly last week with regards to this."*

216. It is apparent from the email chain that this email was in turn forwarded by Mr. Taffe to Mr. Kelly, but no reply was made to Ms. Smith at that time and nor has any response from Mr. Kelly to Mr. Taffe been discovered or produced in evidence.

217. Ms. Smith was referred to a further email (page 68 of the discovery) from the said Mr. Taffe to Miss Smith dated 1st November, 2018, which stated:

> *"I note your call in relation to the KFC unit"*

where he added

> *"This is now out of my hands and with legals and should be dealt with through them."*

218. She was next referred to her email to Mr. Kelly dated the 2nd of November, 2018, in which she stated:

"we made the payment this morning and this is for the 14 days we are due in this period."

219. Asked how the figures paid at that point were calculated, she confirmed that it was a best estimate as she had not received any statement which would enable her to provide an accurate calculation. She was forced to estimate what the appropriate sum might be in the circumstances. She explained that she had never before encountered a difficulty of this nature in obtaining a closing statement and reconciling sums due.

220. In cross-examination on behalf of the Landlord, Ms. Smith was asked whether she made any attempt to get a reconciliation statement following the service of the break notice and whether she was aware of the break notice being served. She confirmed that she first became aware that the break notice had been served in May, 2017. She confirmed that she first contacted Mr. Kelly in relation to the matter in September, 2018. Queried as to why she left it so late, she responded that she normally did not need to request a statement of account as they are provided as a matter of course.

Mr. Giles Musson, Chartered Surveyor and Service Charge Expert

221. A further report on service charges was obtained on behalf of the Tenant from Giles Musson of Jonathan James, Service Charge Specialists. Mr. Musson outlined his extensive background in property management. Mr Musson stated in his report that in order to fully assess the service charge contribution, he would need copies of the Centre, Estate and Building statements. In the absence of this documentation, he was concerned that the Tenant may be being overcharged for a contribution to the Estate and Centre Accounts rather than the Estate and Building Accounts, as detailed in the Lease.

222. Just prior to the resumed hearing date in December, 2024, additional documentation was served on the Tenant including certificates which Mr. Musson had previously sought. Having had an opportunity to assess and consider the certificates produced for successive years, he concluded that they could not be accurate as exactly

the same figures appeared two years running. This, he noted, would be highly unusual. It was a feature of the certificates that even though amounts recorded were different, they added up the same sum.

223. Even assuming the new documentation furnished were accurate (which it appeared not to be), Mr. Musson observed that he could not be satisfied that service charges had been calculated in accordance with the Lease. His evidence was that it remained unclear how the service charge for the Property had been calculated.

Mr. Raj Tuli, Director and Shareholder of Tenant

224. Mr. Tuli began by outlining his extensive business background, starting with a market stall in Scotland in 1980 before opening his first business in Ireland in Blanchardstown, before subsequently acquiring rights to the KFC, Pizza Hut and Costa Coffee franchises. He has stepped back from the business in recent years describing himself as being in "semi-retirement" since in or about 2015 and his brother has day to day responsibility. He described how he built up a team of individuals, including Mr. Conroy, who are relied upon for the running of the businesses.

225. Mr. Tuli's interest in the Omni Shopping Centre was prompted by conversations with Michael Conroy, who had contacts there interested in building a relationship. All three of his business interests - Costa Coffee, KFC and Jeanscene had a presence at the Omni Shopping Centre and he considered that they had a friendly relationship with the owners of the shopping centre, meeting John McKeon once or twice in the early years.

226. When considering opening the KFC franchise, Mr. Tuli observed that it was clear that the premises were not immediately suitable and the question was whether the issues could be resolved. A range of works were required to connect units and ensure that they were suitable for use as a restaurant. He recalled that the work required included a new opening between floors, a staircase, fire exits and other remedial work. According to Mr. Tuli, the work in configuring the separate units into one larger unit

was Landlord work and required expenditure by the Landlord and resulted in delays. He was aware of the various hand-over dates, he said, because he had to approve flights for employees engaged in the work preparing the Property to open. He recalled that the original handover date of the 22nd of September was missed and another date given of the 6th/7th of October, 2008. This in turn was missed. He said that flights had next been approved for 13th of October, 2008, but he was disappointed to receive a phone call on the 13th to say that it would be another 3 to 4 days before the Property was ready.

227. Ultimately, Mr. Tuli confirmed that flights were booked for the 20th for works commencing on the 21st of October, 2008. The restaurant was then fitted out and opened within a 4-week period. It was his understanding, from Mr. Conroy, that the rent-free period agreed under the Lease would only run from the handover date of the 21st of October, 2008.

228. Mr. Tuli recalled that the unit did not trade well at the beginning and the unit did not reach its full potential because of the economic crash. Rent reductions were sought and some discussion was had by Mr. Conroy with the Landlord in this regard but the Landlord was not amenable to a rent reduction on the basis that if KFC received a rent reduction, everyone else would want one too as it was obvious that there was an issue across the board. In Mr. Tuli's experience, however, 90% of landlords worked in partnership with their tenants and rent reductions were negotiated by other landlords.

229. He recalled being "*parachuted*" in to attend a meeting with Mr. McKeon at his office in Clontarf when the market continued to deteriorate. This meeting occurred against the background of a forfeiture notice having been served by reason of rent arrears. His understanding from the meeting was that while the Landlord would not agree a rent reduction, it would agree to vary the Lease to provide for rent payable monthly. From then on, he observed that there was no dispute with the Landlord in relation to rent, whereas previously Mason Owens & Lyons had been pursuing rent from midnight the day before the due date until it was paid.

230. Addressing the circumstances in which the Lease came to an end. Mr. Tuli observed that service charges and rent had been overpaid for years. The treatment of service charges by the Landlord was not in line with common practice and there was always an asterisk next to Omni Park Shopping Centre in the Tenant's account because

of the absence of certificates. It was a recurring issue for years that without certificates and accounts, it was impossible to reconcile VAT and service charge payments with the Tenant's obligations under the Lease.

231. It was put to Mr. Tuli in cross-examination that the Tenant was now raising these issues opportunistically in response to issues with its failure to comply with conditions of the exercise of the break option. He responded that it was just impossible to accurately calculate sums due in view of the practices adopted by the Landlord in relation to the service charges.

LEGAL PRINCIPLES

232. Break clauses are not unusual features of long, commercial leases. The Landlord relies on the well-established principle that effective reliance on a break clause can only be ensured where there is compliance with such pre-conditions to its exercise as may be provided for in the lease. Paragraph 23.07 of *Wylie, Irish Landlord and Tenant Law*, (4th ed, 2022) states that:

> "*It is open to the parties to make express provision as to termination by notice, e.g., by having a "break" option enabling either party, usually the tenant, to determine the tenancy early. In such a case the requirements of the clause in question must be met… A break clause involves the exercise of an option to terminate early a lease which would otherwise run for its full term, so that the rule of strict compliance with the terms for exercise of the option is understandable.*"

233. Wylie further states, at paragraph 20.14, that:

> "*It is not uncommon for a lease for a fixed term to confer on the tenant an "option" to determine the lease before expiration of the term... If the landlord agrees to such a clause, it is usual to make it subject to various conditions, e.g.,*

that the tenant can exercise the options to determine or surrender early only if he has complied with all the terms of the lease up to the time of exercise of the option or by the date of termination. In such cases the tenant should ensure that he has paid all rent and other charges, such as service payments… There may also be other, special pre-conditions which have to be satisfied for there to be a valid exercise of the break option."

234. In the following paragraph, 20.15, Wylie states further that

"*As with other options, the courts are again likely to require the tenant to comply strictly with the conditions for exercise of such an option which may be specified in the lease or tenancy agreement.*"

235. Wylie goes on to refer to the judgment of Lewison L.J. in the UK Court of Appeal judgment in *Siemens Hearing Instruments Ltd v. Friends Life Ltd* [2014] EWCA Civ 382:

"*More recently the Court of Appeal has re-affirmed the need for strict compliance with any mandatory conditions or requirements attached to the break option, with Lewison LJ (who gave the judgment of the court) concluding with the following words "The clear moral is: if you want to avoid expensive litigation, and the possible loss of a valuable right to break, you must pay close attention to all the requirements of the clause, including the formal requirements, and follow them precisely… tenants should still be advised to heed this moral and make sure that there is strict compliance with the terms or conditions for exercise of the break clause."* "

236. The principle of strict compliance with break option conditions was reaffirmed by Eager J. in *Fennell v. McDonagh* [2017] IEHC 98, upholding a landlord's argument that a tenant's purported exercise of a break clause was invalid by reason of failure to exactly comply with the conditions of the clause, stating, at paragraph 12 of his judgment, as follows:

"*This Court accepts that it is well established that parties are required to comply strictly with the conditions for the exercise of an option prescribed in a lease.*"

237. A similar view is expressed in *Woodfall: Landlord and Tenant* (2024), paragraph 17.285 of which states that:

"*A lease may be granted for a fixed term subject to an option given to one party or each of them unilaterally to determine the lease before the expiry of the fixed term. Such an option is usually called a "break clause" and, depending on its terms, a landlord's, tenant's, or a mutual break clause... Options are always strictly construed. This is particularly important in respect of time limits and conditions for exercise of the option.*"

238. Reliance is placed by the author on *Finch v. Underwood* (1876) 2 Ch.D. 310, 335 where it is stated that:

"An option is often expressly made conditional on payment of the rent and/or performance by the tenant of his covenants… Where an option is conditional on performance by the tenant of his covenants, the condition is treated as a condition precedent. Accordingly, it must be strictly performed, and even a trivial breach will preclude exercise of the option."

239. I am further referred by the Landlord to *PCE Investors Ltd v. Cancer Research UK* [2012] EWHC 884 (Ch), [2012] 2 P. & C.R 5 to illustrate the requirement for compliance with conditions precedence to exercise a valid break. In that case, a break clause required the tenant to pay rent "up to" the break date. The tenant was held not to be entitled to exercise the break option where he had not paid the full quarter's rent due on the quarter day preceding the break date, but merely an apportioned part of a quarter's rent for the period from the preceding quarter day up to the break date. Similarly, in *West Country Cleaners (Falmouth) v. Saly* [1966] EWCA Civ J0719-1, [1966] 1 W.L.R. 1485, the exercise of a break option by a tenant was precluded in circumstances where the break option required the tenant to comply with covenants in the Lease and the tenant had failed to comply with a covenant to decorate in the last year of the term. The same approach had previously been applied in *Job v. Banister*

(1856) 26 L.J. Ch. 125, where some buildings erected by the tenant were out of repair, and the property had been left uninsured for four days.

240. For its part, the Tenant does not demur from these general principles and acknowledges that the strict construction of break clauses is a consistent theme throughout the authorities. The Tenant's fundamental position is that there has been full compliance by it with the pre-conditions to the valid exercise of the break option, albeit partly in reliance on variations agreed to the Lease in relation to payment of rent. It further relies on an implied condition that the Plaintiff's Letting Agent would provide a closing statement in respect of Rent, Service Charge and Insurance Rent upon request and in a timely manner in advance of the Determination Date to allow the Tenant to properly exercise its break option. In addition to contending for an implied duty not to prevent it from properly exercising the break option through its wrongful acts, the Tenant also contends that the Landlord is estopped from denying that the Defendant properly exercised Clause 6(10)(a).

241. In support of its estoppel argument, the Tenant relies on the decision of Laffoy J. in *The Barge Inn Ltd. v. Quinn Hospitality (Ireland) Operations 3 Ltd.* [2013] IEHC 387 and more recent dicta in *Tyrell v. Wright* [2018] IECA 295 and *Egerton v. Edgeform Materials* [2023] IECA 119. Separately, the Tenant invokes "*the prevention principle*" which operates to prevent a party taking advantage of his own wrong citing the decisions of Barron J. in *Royal Trust Company of Canada v. Kelly* [1989] IEHC 33, O'Higgins J. in *Meridian Communications Ltd v. Eircell Ltd.* [2001] IEHC 195, [2001] I.R. 17 and *Airscape Ltd. v. Heaslon Properties Ltd.* [2008] IEHC 82.

MIXED FINDINGS OF FACT AND LAW

Property for Lease

242. The issues which arise for determination are mixed issues of fact and law. They are closely interrelated because the requirements of the Lease as at the break date are

tied with my conclusions in respect of claimed variations to the Lease. Having heard the evidence some facts are beyond dispute whereas others are established on the balance of probabilities, while some assertions are not proven to my satisfaction.

243. It has been clearly established that the ground and first floors of the Property were originally constructed as separate units in 2007 with the result that ensuring the Property was suitable for Lease required additional steps to be taken including obtaining planning permission obtained. The Tenant was the first occupant of the Property and I am satisfied that the costs of readying the Property for letting to the Tenant was a factor which weighed on the Landlord in reaching commercial decisions around the letting. Where the responsibility for various necessary costs lay was undoubtedly a factor in the parties' negotiations as a precursor to entering the Lease. Certain costs were accepted as Landlord costs and assumed as such but not others.

244. It is a matter of record that prior to the commencement of the Lease, the Landlord secured planning permission (reg. ref. 3322/08), granted on the 25th of September, 2008, to merge the ground and first floor units and change the use from café (at ground floor) & office (at first floor) to restaurant use over both floors. The grant of planning permission in September, 2008 would clearly have been fundamental to any agreement. In my view, no substantial works to prepare the Property would likely have been undertaken until planning permission was secured and the commencement date of the Lease would have been pushed out beyond the control of either party by reason of the need to secure planning permission.

245. On foot of planning permission granted, the Landlord then undertook works to separate the property to form an independent own door occupancy. The Landlord also undertook structural alterations to form the structural opening between the ground and first floor accommodation for the installation of a staircase, but the costs of installing the staircase featured in negotiations between the parties as an item of expenditure which the Landlord was not willing to assume.

246. It seems to have been reluctantly accepted by the Tenant that the staircase was to be an item of Tenant expense, as was the ground floor exterior glazing. Although this is no longer in dispute, it seems from the correspondence that this caused some

contention between the parties at the outset and probably explains why there were delays in payment for the work in installing the staircase.

247. The fact that work pertaining to features such as staircase and glazing were more atypically designated as areas of Tenant responsibility on this commercial letting contributed, in my view, to the problems which ensued for the parties when the Tenant subsequently sought to rely on the break option. It led to some ambiguity or a lack of certainty and provided scope for disagreement as to when the Tenant secured handover of the Property, triggering a commencement of obligations under the Lease. It is in this context that the related questions of when the obligations under the Lease as to rent arise requires to be determined.

Breach of Covenant as to Rent

248. I have no difficulty accepting that there were delays and that the Property was not ready for handover in September or early October, 2008, as originally intended. Afterall, planning permission was only obtained in late September, 2008. The fact that the Property was not ready for Tenant handover led to the extension of the end of the rent-free period from the 6th of April, 2008, as originally recorded on the Lease to the 14th of April, 2009, an extension confirmed through an amendment to the written terms of the Lease prior to execution.

249. While it is agreed that proposed handover dates in September, 2008 and early October, 2008, were missed, there is significant dispute between the parties as to when the Landlord's works were completed and when the Property was actually ready for handover. The Landlord contends that the property was handed over on the 14th of October, 2008, consistent with the date indicated on the Lease where the liability date is specified, whereas the Tenant maintains the Landlord works were not complete and therefore the Property was not ready for handover until the 21st of October, 2008, resulting in an agreed variation of the Lease providing for the rent-free six month term to run from the 21st of October, 2008, rather than the liability date specified under the Lease.

250. The difference in handover date assumes an importance in this case because it potentially accounts for one week's difference in the calculation of rent due under the

Lease. As already noted, in its Defence and Counterclaim and oral evidence adduced, the Tenant contends that the rent-free period in the Lease was extended to the 21st of April, 2009, by oral agreement between the Tenant (Mr. Conroy on behalf of the Tenant) and John McKeon, representing the Landlord's interests, consequent on delays in the Property being ready for handover. This extension of the rent-free period is relied upon to contend that there were, in fact, no arrears of rent due on the break date.

251. In the normal course, it should not be necessary to look beyond the terms of the Lease executed. Unfortunately, reliance on the documents alone is not entirely satisfactory in this case because certain apparent irregularities undermine the quality of the documentary evidence as evidence of what was in fact agreed.

252. To give a flavour of these irregularities, I note that despite the involvement of solicitors on both sides and notwithstanding the commercial nature of both parties to the Lease, the approach to the execution of the Lease appears to have been particularly lax. Unusually, at least in my experience, the Lease is dated 14th of October, 2008, but signed on the 17th of October, 2008. Rather bizarrely, there is an Agreement for Lease also signed on the 17th of October, 2008, when one would have thought the need for such an agreement was largely redundant. I note in this regard, however, that it appears to contain a description of approved Tenant works which potentially explains why the Agreement for Lease had some residual significance as of the date of entry into the Lease.

253. Not unusually the typescript of the Lease itself bears handwritten insertions. Dates appear to have been inserted or amended prior to execution. Evidence has not been called from the solicitors who acted in the transaction. In what might charitably be described as poor practice, Mr. Conroy claims that he signed the back page of the Lease as received and without the body of the Lease. He claims he did not receive a full copy of the Lease until many months subsequently. Accordingly, it is unclear to what extent dates formalised in the Lease as signed by the parties were checked by the parties when they signed the Lease. While I am prepared to assume absent evidence to the contrary that such handwritten amendments as occurred were done by solicitors acting on client instructions, the evidential position in this regard is not satisfactory.

254. It seems on his own evidence that Mr. Conroy signed the Lease on behalf of the Tenant, trusting the Lease to accurately reflect the terms agreed without checking that this was so by reading the Lease. I have no basis upon which to doubt the veracity of Mr. Conroy's evidence in this regard but accepting that it is true, it was clearly an unsafe and unsatisfactory practice and it is entirely implausible that he could have done so unless he trusted solicitors acting on both sides to have included the correct dates to reflect instructions as to what was happening on the ground in terms of handover for Tenant occupation.

255. Despite my conclusion that it is entirely implausible that the Lease would have been signed without checking, absent a high degree of trust that solicitors acting on up to date instructions had verified the correctness of dates inserted, the combination of factors outlined above mean that to my mind, the documents do not provide the degree of certainty normally characteristic of documents created in the context of an arm's length business relationship benefitting from a full range of professional advice. It is for this reason that I have decided that it is appropriate to consider the oral evidence to see if the Tenant can satisfy me that an extension of the rent-free period to the 21st of April, 2009, had been agreed, albeit never recorded in writing. In terms of displacing the written record of the agreement reached, I would need strong evidence to persuade me that I should not treat the written terms of the Lease as binding on me.

256. Whether the Lease was varied as contended on behalf of the Tenant to provide that the rent-free period would commence on the 21st of April, 2009, and not the 14th of April, 2009, as recorded in writing, requires me to consider whether I believe the evidence of Mr. Conroy to this effect. He claims the extension was agreed in a telephone conversation on the 14th of October, 2008. In deciding the probative value attaching to Mr. Conroy's evidence, I have had regard not only to his evidence in relation to the conversation but also the surrounding contested position with regard to the state of readiness of the Property for Tenant handover as at the 14th of October, 2008 and the position on the documents. If I were to find that the Property was not ready for Tenant occupation, it would tend to support Mr. Conroy's contended for extension of the rent-free period but, as a logical corollary, where the evidence supports the contrary conclusion, then this would be consistent with the formalised terms of the Lease and against the Tenant's contended for position.

257. In the face of Mr. McKeon's denial of any agreement to extend the rent-free period beyond that already indicated in the Lease and in the absence of written evidence that such an agreement was reached, I have not found Mr. Conroy's evidence persuasive as to an agreed variation of the rent-free term under the Lease. While the lack of precision in his evidence might be explained by reason of the passage of time, I am troubled by the fact that he gave no evidence that he communicated the extension supposedly agreed to the solicitors acting for the Tenant or recorded the extension in an email, either internally or externally. It seems to me highly unlikely that if agreement of the type contended for had been reached, that it would not be recorded in writing. The absence of any record in writing, even internal email, carries weight to the absence particularly because a previous extension of the commencement of the rent-free period consequent upon accepted delay in handover was reflected by an amendment to the Lease. It is strange that a first variation is recorded in writing, but not a second when the precedent had been established.

258. My rejection of Mr. Conroy's evidence as to an agreed extension of a rent-free period rests not only on the absence of any contemporaneous record to support him in this regard but is also not borne out by the evidence adduced in relation to the position on the ground about the state of readiness for tenant handover. His contentions as to an agreed extended rent-free period are undermined by the fact that the basis relied upon for the asserted further extension, namely that the Property was not yet ready for handover by the 14th of October, 2008, has not been established on the evidence to my satisfaction.

259. In terms of my assessment of the evidence as to the state of readiness for handover, it is common case that handover of the Property was dependent on the completion of certain Landlord works. It is also common case that certain of these works were structural in nature. It is not now disputed that Landlord works included works opening a void between the ground floor and upstairs to merge what had formerly been two separate units by allowing for the installation of a staircase. It is apparent that there was some debate, however, during the works and in paying for same as to where the responsibility for the installation of the staircase itself lay. This controversy appeared to continue to a date well passed the date of occupation of the Property by the Tenant as the evidence demonstrates that the Tenant ultimately only paid for the

staircase a considerable time later. Mr. Nolan was animated in his evidence in relation to the delay in securing payment from the Tenant and his indignation struck me as genuine.

260. Ultimately, it is clear on the evidence that the Landlord assumed responsibility for opening the void and paid for works in this regard, but the Tenant was affixed with and accepted, albeit reluctantly, the cost of the staircase and discharged the sums due to the contractor in this regard after a period of delay. I acknowledge that the fact that the dispute as to where responsibility for the installation of the staircase lay meant that it would not have been clear to the parties at the time as to when the Landlord's works were complete and when the Property was ready for handover to the Tenant. This lack of clarity was contributed to by the fact that the Landlord and Tenant used the same contractor for all works relating to the installation of a staircase. Indeed, it seems to me quite likely that for a short period of time, Landlord and Tenant works continued apace and simultaneously with Mr. Nolan moving from work on behalf of the Landlord to work on behalf of the Tenant, while other Landlord contractors remained on site finishing up other elements of Landlord work.

261. While witnesses on behalf of the Landlord firmly posited that the unit was ready for handover by the 14th of October, 2008, witnesses for the Tenant gave evidence to contrary effect. Mr. Pat Nolan, the building contractor engaged by both the Landlord and the Tenant, gave evidence that there were no Landlord's works pertaining to the stairwell outstanding after the 5th of October, 2008. This is not accepted by the Tenant's witnesses and specifically, Mr. Ritchie and Mr. Patterson claim that the stair opening was not complete when they inspected the Property on the 7th of October, 2008. They rely on the fact that contractors travelling from the UK to carry out KFC fit-out did not travel until the 20th of October, 2008, they say because the Property was not ready for fit-out until then.

262. In reconciling this conflict, I attach weight to the evidence of Mr. Nolan who carried out the work both because of his apparent clarity in relation to what happened in his oral evidence and the fact that his account was supported by emails sent at the time. He confirmed in oral evidence that Phase 1 included the opening for the stairway. In his email of the 5th of October, 2008, he confirmed that Phase 1 was complete. This remained his position in his oral evidence.

263. On the question of whether the Property was ready for handover by the 14th of October, 2008, Mr. Nolan was entirely satisfied that all Landlord works relating to the staircase were complete by that date. While Mr. Ritchie and Mr. Patterson offered contrary evidence, as neither Mr. Ritchie nor Mr. Patterson attended on site on the 14th of October, 2008, and last visited the site on the 7th of October, 2008, I can attach no real weight to their evidence that the Property was not ready for handover by the 14th of October, 2008 in the face of Mr. Nolan's categoric evidence.

264. I am reinforced in my conclusions on this question by the contemporaneous documentary evidence which suggests an alternative reason for delay in handover after the 7th of October, 2008. The clear position of the Landlord in an email from Mr. McKeon communicated to Centre Management on the 7th of October, 2008, when informed of the Tenant's wish to access the Property the following week, was that the Tenant would only be permitted access for Tenant works once the Lease documentation had been formalised. Therefore, the impediment to Tenant works commencing the following week as apparent from Mr. McKeon's email of the 7th of October, 2008, was not that the Property was not physically ready for handover, but that the Lease documentation had not been completed. Based on this email, I have concluded that while the Landlord may still have been tidying up its works on the Property, the Tenant was anxious to take up occupation to start its own fit-out works which were going to take a number of weeks.

265. For these reasons, I prefer the Landlord's evidence in relation to the state of readiness of the Property for Tenant works as of the 14th of October, 2008. I am satisfied that a shell and core / grey box state of completion had been achieved by the 14th of October, 2008 with both ground floor glazing and the internal staircase to be installed at the Tenant's expense as part of Tenant works, albeit the staircase was installed by the Landlord's builder. KFC fit-out was a matter for Tenant contractors and they arrived to commence work on the 21st of October, 2008, but this does not mean that other Tenant works had not already started by then. While Mr. Nolan remained on site after the 14th of October, 2008, I am satisfied that this does not mean that the Property was not ready for handover for commencement of Tenant works on that date, as it is a fact that he had been retained by the Tenant to fabricate the stairs and fit a handrail. His work on the staircase did not conclude when the opening was created and structural

steel work was in place. This work took further time to complete and was ongoing into November, 2008, but during this period Mr. Nolan remained on site, not as Landlord contractor but as Tenant contractor. Indeed, the fact that some Landlord works may have been continuing after the Property was handed over as ready for Tenant works is not incompatible with Lease obligations having been triggered where the Tenant enters possession on foot of the Lease.

266. I have concluded that once the Tenant was afforded access to the Property for the purpose of conducting Tenant works, it did so on foot of its entitlements under the Lease, thereby also triggering obligations under the Lease. Of course, this would not preclude an agreement to extend a rent-free period, but one would expect to see such an agreement recorded in writing if, in truth, such agreement was reached. No record in writing of any such agreement has been adduced and it has not been established that a further extension of the rent-free period was agreed.

267. I regret to further observe that I found Mr. Conroy's evidence generally lacking in qualities of clarity or consistency of a kind which would cause me to attach much probative value to it. While some lack of clarity is understandable given the passage of time, his position in evidence across a range of issues does not have the benefit of consistency or logic. By way of example, his evidence about payment of rent monthly was inconsistent as between what was said on affidavit and orally. It was also confusing. His contention that payments made monthly rather than quarterly in advance would be in ease of the Landlord did not carry the force of logic. His hearsay account of what occurred on the day of inspection and in relation to discussions concerning a reconciliation statement differed from the direct evidence of witnesses involved (Mr. Ritchie and Ms. Smith).

268. The quality of his evidence was not such as to persuade me that the contention made on behalf of the Landlord that elements of the Tenant's position in these proceedings, including the alleged agreement to extend the start date of the rent-free period under the Lease, were opportunistic and designed to demonstrate compliance with covenants in support of a successful invocation of the break clause was unfair or unwarranted. The contention that evidence was offered to suit the Tenant's ends insofar as a variation of the Lease as to the start of the rent-free period is concerned is not one

that I can reject as being without any foundation. I harbour real doubts in this regard. It seems to me indeed possible that in contending for a further extension of the rent-free period on the basis that the Property was not ready for handover until the 21st of October, 2008, made for the first time in these proceedings and many years after the alleged agreement, Mr. Conroy may be seeking to exploit the ambiguity arising from the manner in which documents were formalised and works were done to argue for an extension of a rent-free period in a manner which allows the Tenant to maintain that rent obligations had been discharged up to date.

269. The irregularities with the dates recorded on the Lease notwithstanding and as outlined above, I have concluded that a commercial entity such as the Tenant, experienced in property matters and legally advised, would not have entered into the Lease bearing a start date of 14th of October, 2008, unless satisfied that the Property was ready for Tenant occupation and satisfied that the clock should start to run on the agreed six-month rent-free period. There is no independent corroborative documentary evidence of any agreement to treat the start date of the Lease as the 21st of October, 2008, contemporaneously with the execution of the Lease or the occupation of the Property, as I would expect had such agreement been reached. A simple extension to the rent-free period along the lines already noted on the face of the Lease or a side letter confirming the Landlord's agreement to this is all that would have been required to persuade me otherwise. I find the fact that the extension was recorded to the 14th of April, 2008, but not the 21st of April, to be especially compelling. If this extension was noted by reason of a delay in handover on the 6th of October, 2008, it beggars belief that it would not also have been similarly noted if the 14th of October, 2008 date were also missed consequent upon Landlord delay.

270. I am satisfied that by the 14th of October, 2008, the impediment to Tenant works commencing was the fact that the Lease had still not been formalised and not any outstanding Landlord works. It is simply not plausible that the Tenant, experienced in business and in property matters and with the benefit of legal representation would have entered into the Lease in the terms formalised unless satisfied that the Property was ready for Tenant occupation for the purpose of carrying out Tenant works and unless prepared to assume responsibilities set out under the Lease in the terms of the Lease as executed. I am satisfied on the balance of probabilities that the Tenant agreed to enter

into occupation from the 14th of October, 2008, because by that date the Property was ready for tenant works to commence.

271. No sufficient reason or lawful basis for looking behind the liability date as recorded in the Lease itself has been established. Accordingly, I reject the Tenant's claim for an additional allowance for one week's rent referrable to an effective handover date of the 21st of October, 2008, as it has not been established on satisfactory evidence that such further extension was ever agreed. I conclude that the agreed six-month rent-free period ran from the 14th of October, 2008 (as stated in the Lease) and not the 21st of October, 2008, as contended on behalf of the Tenant in these proceedings.

272. The Tenant further asserts that the provision in the Lease for payment of rent quarterly in advance was varied by oral agreement between Mr. Conroy and/or Mr. Tuli on behalf of the Tenant and Mr. McKeon on behalf of the Landlord to provide that rent would instead be payable monthly in arrears. Again, consequent upon this contended Lease variation and when allowance is duly given for these amendments to the Lease by agreement, the Tenant alleges that as of the 13th of October, 2018, no money was owing to the Landlord under the Lease because there was no liability at that time to pay rent quarterly in advance and on a month for month basis or part thereof, rent and charges were paid up to date. Furthermore, the Tenant argues that, despite the terms of the Lease, it was only liable to pay rent monthly in arrears.

273. In evidence, Mr. Conroy on behalf of the Tenant asserted on Affidavit, and subsequently under oath, that a meeting took place between Mr. McKeon, for the Landlords' predecessor in title, and Mr. Conroy and Mr. Tuli, for the Tenant. He further asserted that at the meeting Mr. McKeon requested payment of rent by direct debit, which was subsequently agreed, provided that such rent could also be paid monthly in arrears. Mr. McKeon gave evidence that, although he met with Mr. Conroy and Mr. Tuli, no such agreement was reached; they were merely informed that he was unable to agree a rent reduction. According to Mr. McKeon, he would not have made any decision in relation to payment of rent without first consulting with his co-owner at that time, Mr. Kennedy.

274. Although Mr. Tuli concurred with Mr. Conroy's account of the meeting, it was clear from his evidence that he had little independent recollection of events at the

meeting and was choosing to rely largely on Mr Conroy's account of what had been agreed. The position adopted by Mr. Tuli in his evidence struck me as one which would allow him to save face where the evidence advanced on behalf of the Tenant in defending these proceedings was not accepted. I found his evidence generally undermining of the position advanced on behalf of the Tenant due to his approach in relying on and referring to Mr. Conroy's evidence in respect of a meeting he had travelled from abroad to attend. It is peculiar that having made such an effort to attend the meeting that he would have so little independent recollection of what occurred at it.

275. There is no independent documentary evidence that the agreed variation reached was to pay rent monthly in arrears, notwithstanding the Tenant's vague and unpersuasive contention to the contrary. I found this contention to be also inconsistent with the practice in relation to the payment of rent. The assertion that Mr McKeon sought payment by direct debit and agreed to payment monthly in arrears in consideration of this, is further belied by Mr Conroy's own correspondence prior to the meeting, in which he asks Mr. Kelly to find out if rent would be accepted monthly in advance by direct debit. Moreover, there is no written record, following the meeting, recording the agreement allegedly reached of an agreement to pay monthly in arrears.

276. Any doubt I may have in this regard is dispelled by a review of the Statements of Account from which it is clear that rent was paid at the beginning of each month with the balance reducing to zero at the beginning of the third month in a quarter rather than the end of the quarter. The practice as evident from the Statement of Accounts over time was to invoice quarterly, but to pay rent monthly in advance rather than in arrears. I am not satisfied that there was any agreement to pay monthly in arrears and I reject the Tenant's contentions in this regard. I note, however, that on one view paying monthly in advance could be treated as being in arrears simply because the invoice was monthly in advance with the result that the Tenant was in arrears on a quarterly invoice until the beginning of the third month of the quarter when the third tranche of the amount invoiced quarterly was paid.

277. While not satisfied that there was agreement to pay monthly in arrears, I take a different view, however, in relation to a contended for variation to permit payment monthly. Although there was dispute as to which party proposed that the rent would

be paid monthly, there can be little dispute but that both parties ultimately agreed to this. On the 27th of January, 2010, Mr. McKeon emailed Mr. Conroy, stating:

> "*As per our discussion you said that you would like to pay the rent on KFC monthly in advance.*"

The email went on to request that a standing order be put in place on a monthly basis: "*as per your proposal*", and asked for the arears of service charge to be paid ASAP.

278. On the 17th of February, 2010, one Mr. Alex Toland (of the Letting Agent, Mason Owen & Lyons) emailed Mr. Conroy stating:

> "*Re KFC we need you to bring the account up to monthly in advance. Midmonth payments as previously suggested by you won't be accepted. Anne-Marie will organise a statement of account to be sent to you as well as a standing order to pay monthly in advance*."

279. In February 2011, the Landlords served a forfeiture notice. On the 18th of May, 2011, Mr. Kelly sent an email to the Landlord's solicitors regarding payment of rent monthly, stating:

> "*No formal agreement in place, but I did tell Michael Conroy that without prejudice we would not refuse payments made monthly in advance*."

280. In June 2011, as outlined above, Mr. Conroy, Mr. Tuli and Mr. McKeon met at Mr McKeon's offices in Clontarf. Whilst the Defendant sought a rent reduction, the parties agreed terms relating to payment of the rent monthly and additional signage. From that date onwards, neither the Plaintiffs nor their managing agents sought to require or enforce quarterly rent in advance, other than continuing to invoice quarterly. They never sought interest on late payments due to the rent being paid monthly. Whilst

the rent continued to be billed by Mason Owen & Lyons on a quarterly basis, I have no doubt but that it was treated as due monthly and was accepted as not being in arrears once paid monthly.

281. Although I have rejected the Tenant's position that the Lease was varied by agreement to allow for payment monthly in arrears, it seems to me that there is ample evidence that there was agreement to vary to allow for monthly payments in advance. This is consistent with both email traffic and custom and practice. The practice from 2011 until October, 2018, was clearly to pay rent monthly in advance notwithstanding that the Landlord continued to bill quarterly. Even though the Lease provided for interest on arrears, no attempt was made at any time from 2011 by the Landlord to claim interest because of arrears in payment of rent which was being paid monthly instead of quarterly. I consider this to be more than forbearance or mere acquiescence as suggested by witnesses on behalf of the Landlord (most particularly Mr. McKeon). Instead, I consider a variation as to the payment of rent monthly in advance was agreed as representing some concession to the Tenant which also operated to incentivise the Tenant to pay on time against a background of falling into arrears even on monthly payments. This minimal concession was made at a time when the Tenant was seeking a rent reduction due to financial pressures and had fallen into arrears resulting in the service of a forfeiture notice.

282. I have concluded based on the nature of the oral evidence offered when viewed together with the contemporaneous documentary evidence, that the Landlord was not entirely unsympathetic to the Tenant's position when it sought a meeting to agree a variation in respect of rent in July, 2011, and ongoing good relations would have required some concession be made given the general trading conditions. Mr. McKeon in his evidence confirmed that during the difficult period of the economic crash the Landlord worked with tenants on an individual basis. While not unsympathetic, it appears and I accept that the Landlord was implacably opposed to a rent reduction asserting difficulties with reducing the Tenant's rent related to covenants to the Bank and the unlikelihood of the Bank agreeing a reduction for a tenant such as a KFC franchise. Although not directly relevant, I have been caused to wonder whether had a more flexible approach been adopted by the Landlord at that time whether the Tenant would have been so determined on exercising the break option. It is possible that a

refusal to engage in negotiations as to a rent reduction was short sighted if it had the consequence of a decision being made to rely on the break clause or if it contributed to the Tenant's resolve to leave the Shopping Centre at the first opportunity to do so. I accept the Landlord's evidence, however, that there was also a consideration of the precedent effect for negotiations with other tenants which had to be considered by the Landlord in deciding on its approach to the request for a rent reduction.

283. While unable to agree a rent reduction, it seems to me that the Landlord did agree a variation of terms to permit the more viable (from a cashflow perspective) payment of rent monthly. This agreed variation was one which presented no real difficulties for the Landlord because it did not result in any reduction in rental payment requiring Bank consent nor a reduction in actual rent paid. A variation permitting payment of rent monthly in advance also had some advantage, albeit very small, from the Landlord's perspective in that it gave almost instant visibility in relation to the financial wellbeing of a tenant. Financial vulnerability would become quickly apparent where a tenant was struggling to meet monthly payments. Perhaps more importantly, however, the revision had the appearance of some concession to the Tenant short of agreeing a rent reduction at a time when the market had changed and many tenants were experiencing financial difficulties necessitating either significant rent reduction or forfeiture.

284. I am most particularly persuaded that the Landlord agreed a variation as to the payment of rent rather than merely acquiesced in it because, from hearing the evidence of Mr. McKeon and Mr. Kelly, I have no doubt that had the Landlord not agreed this variation, even if through necessity arising from the exigencies of a distressed market following the economic crash commencing in 2008, it would have acted immediately, as it has shown itself well capable of doing so having already served a forfeiture notice, to require compliance with the strict terms of the Lease or forfeit. Any temporary forbearance or acquiescence would not have endured for upwards of seven years subsequently even after the service of notice of intention to rely on the break option.

285. Despite a practice of payment of rent monthly in advance which endured for some seven years, the Landlord never once made any complaint or took any step to secure compliance with the black letter of the Lease. Given the involvement of a

professional letting agent and a Landlord who was vigilant to monitor compliance with rental obligations and in view of the particular Landlord and Tenant relationship in issue, the fact that the Landlord did not protest in relation to a changed practice of rent payments is only consistent in my view with a conclusion that, as contended on behalf of the Tenant, there was an agreed variation with regard to the payment of rent monthly rather than quarterly.

286. Accordingly, I am satisfied that the Landlord refused a rent reduction but clearly agreed to the payment of rent monthly. I am quite satisfied that this was because it had agreed to vary the terms as to the payment of rent and that this was not just a temporary arrangement or variation, but was intended to characterize the payment obligations under the Lease for the balance of its term. To the extent that Mr. Kelly referred in correspondence to the lack of a formal agreement but a "without prejudice" indication that payment would not be refused monthly in advance in his email in February, 2011, this was overtaken by events. When rent variation was agreed in at meeting in June, 2011 between the Landlord and Tenant, it was not caveated in any way as "*temporary"* or "*without prejudice*" to obligations to pay quarterly under the Lease.

287. Contrary to the Landlord's contention, it seems to me that there was consideration for the variation in rent payment to rent monthly, rather than quarterly, in that the Tenant remained *in situ* paying a significant rent at a time when other businesses were unable to continue to trade with inevitable consequential losses for landlords whose tenants ceased to trade. I am also satisfied, again contrary to the Landlord's contention, that the Tenant relied on an accepted variation of the Lease in calculating amounts due on the break date. It was never suggested by the Landlord, prior to the break date, that it would no longer accept payment of rent monthly in advance and that the effectiveness of the break clause would be disputed if a full quarter's rent was not paid at the beginning of October, 2018 notwithstanding the established practice since 2011 of paying monthly.

288. To the extent that the Landlord continues to seek to rely on the express terms of the Lease to claim that a full quarter's rent was outstanding as at the break date, it seems to me this reliance is unsound.

289. This brings me to the question of whether the Tenant was in arrears as at the break date. As summarised above, I heard extensive evidence on the question of arrears.

290. While claiming not to have been arrears on the break date, it is significant that the Tenant made a further payment on the 2nd of November, 2018, in the sum of €7,579.85 notwithstanding that a reconciliation statement had not been provided. It is suggested on behalf of the Landlord in submissions that the only logical explanation for the November 2018 payment is that it was made in belated recognition by the Tenant that it had failed to comply with its obligations on the break option date.

291. While I agree that the payment was made as an estimate of an amount that may still be owing under the Lease, it seems to me that the payment of €7,579.85 is also explicable not as a belated attempt to rectify an oversight but by the fact that it had become apparent that a reconciliation statement was not to be immediately forthcoming and that instead, the Landlord intended to assert a failure to properly execute the break option in part on the basis of arrears. Afterall, Ms. Smith had been told the matter was now "*with legals*" and a solicitor's letter had issued. I am satisfied that faced with this scenario, the Tenant conducted its best efforts at its own reconciliation, albeit it could never aspire to be exact in the absence of proper Landlord information and I do not treat the *ex post facto* payment as conclusive evidence that the Tenant was in arrears and therefore not entitled to rely on the break clause.

292. Based on the information now available and the evidence heard, it seems to me that there were some small arrears at the break date. Calculating rent due on a proportionate basis to the break date as appropriate on my reading of the Lease, then the Tenant was still one week short in circumstances where I do not accept that the rent-free period had been extended to the 21st of April, 2009, as contended on behalf of the Tenant. Similarly, pro-rata payments in respect of service charges and insurance had not been paid for the period between the 1st and 14th of October, 2018. These arrears, calculated on the basis of an extended rent-free period to the 14th of April, 2009, an adapted insurance and service charge and on the premiss that rent was payable monthly in advance, are minimal in the relative scheme of the rent payable under the Lease and the rent paid during the 10-year span of the Lease. On my assessment of the evidence and in light of my findings as to the Tenant's obligations under the Lease, they do not

exceed a figure of €3,699.84 (being the figure given by Mr. Kelly as due on the break date of the 13th of October, 2018 on the basis of the rent free period ending on the 14th of April, 2009).

293. The Tenant also called extensive evidence seeking to prove overpayment of service charges, claiming this alleged overpayment acted as a credit to cancel out any arrears which might otherwise have been due as of the break option date. It is noteworthy that the issue of overpayment of service charges did not feature in either Mr Conroy's original Affidavit, or in the lengthy Defence and Counterclaim. The Tenant did not furnish any documentary evidence evidencing any concerns or complaints on its part prior to the break option date regarding the computation of service charge. Attempts by Mr Conroy in evidence to assert that concerns had been raised by him regarding service charge computations prior to this date were unconvincing. I do not believe that, if the Tenant had had such prior real concerns in relation to the calculation of service charges due or overpayment, there would not be some documentary evidence of this but none was adduced.

294. It is also notable that while the Tenant makes assertions in respect of overpayment of service charges, there has been no real attempt to define the extent of such overpayment. The evidence remains that there was non-compliance with the requirements of the Lease as regards certification but there is no evidence to support a finding that service charges were overpaid by the Tenant or to allow the quantification of such overpayment. Having never raised an issue in relation to service charges over the years of its occupation of the Property and having regard to the failure to plead any reliance on an entitlement to a credit for overpaid service charges in the pleadings viewed in the context of a six-year limitation period on any such claim, I have not been persuaded that as of the break option date, the Tenant was entitled to credit for service charges paid under the Lease.

295. Similarly, as regards the alleged improper levying of VAT on service charges, while the practice in this regard is unfavourable to the Tenant and does not sit comfortably with legislative requirements such that the Tenant might be within its rights to raise objection to the practice, no issue appears to have ever been raised on behalf of the Tenant prior to the break date. I have no doubt that issues are raised now

in an *ex post facto* attempt to address the potential implications of a finding that arrears were outstanding as at the break date such as to disentitle the Tenant to its right under the break option rather than from a genuine concern that the Tenant has overpaid VAT historically and is due a credit in consequence to cancel out any arrears established in respect of rent or other charges as at the break date.

296. I do not accept, based on the established practice of the parties over the years of the Tenant's occupation of the Property, that the Tenant is entitled to assert a credit as at the break date such as to off-set any arrears of rent then outstanding. I have concluded that the Tenant was, if only minimally or technically, in arrears as at the break date.

297. I consider the evidence with regard to the calculation of service charge and VAT together with the lack of clarity on both sides as to when the rent-free period ended to be of some significance, however, when it comes to the request made for a reconciliation statement. I am quite satisfied on the evidence adduced that the position regarding the computation of sums outstanding as of the 13th of October, 2018 was not straightforward and required reconciliation and access to accounts, albeit it was the Landlord's unspoken intention to carry out this reconciliation at a later date on the basis that it was not possible to do so contemporaneously with the determination date. Indeed, it is likely that had a reconciliation been done in advance of the 14th of October, 2018, it could only have been done on the basis of an estimate and subject to subsequent reconciliation.

298. This leads me to the conclusion that had the Landlord provided a reconciliation statement which gave an estimate of rent, service and insurance charges to the 14th of October, 2018 prior to the break date, a failure on the part of the Tenant to discharge the sums representing a reasonable estimate of sums due calculated on a *pro rata* basis, albeit subject to subsequent reconciliation, would have rendered it in breach of a condition of Clause 6(10)(a)(ii) of the Lease.

299. Had the Landlord either furnished a reconciliation statement in a timely manner on foot of the Tenant's request for same or made it clear in good time that it was refusing to provide such a statement, then the Tenant could have engaged in an accountancy exercise to eliminate a risk of being in arrears in a manner which would preclude reliance on the break clause. This draws into focus, however, the approach of the

Landlord to providing a reconciliation and the extent to which it is lawful to attach culpability to the Tenant's failure to clear all arrears as at the break date by reason of minimal arrears as at that date by treating the Tenant as in breach of a condition of the break option that rent be paid up to date. Directly relevant to this question is the Tenant's contention that there had been agreement that a reconciliation statement would be produced for the purpose of discharging arrears. Materially, the Tenant also further alleges that it had been agreed that any balancing statements would await the provision of a reconciliation statement.

300. On this issue, Ms. Smith gave clear, straightforward and compelling evidence that she spoke with Mr. Kelly by telephone for about five minutes on the 26th of September, 2018. This was confirmed by reference to her telephone records for that date. During this call she asked that Mason Owen & Lyons would provide her with a closing statement or reconciliation. Her evidence was that Mr. Kelly stated that he was unaware of the break clause being exercised but that he would contact the Landlord and would come back to her. He never did.

301. Mr. Kelly gave evidence initially that he had no recollection of that call. On the last day of the hearing, after being recalled, Mr. Kelly suggested that the call may have been with someone else in his office but, crucially, this was never put to Ms. Smith on cross-examination. I accept unreservedly that Ms. Smith spoke with Mr. Kelly on the 26th of September, 2018, precisely in the terms she outlined in evidence. It must have been clear from that point that the Tenants were anxious to regularize their accounts and had no intention of allowing unpaid arrears to persist upon termination of the Lease. If there was an issue as to how arrears were to be calculated, these issues should have been identified on behalf of the Landlord following this enquiry. The failure to take a constructive approach to enable the effective operation of the break clause by providing the necessary financial information to quantify arrears due had clear implications for the Tenant's ability to exercise its rights under the Lease.

302. On the 3rd of October, 2018, Mr. Taaffe of Mason Owen & Lyons sent Ms. Smith a statement of account by email. The amount invoiced in this statement was not in accordance with the terms of the Lease. At its simplest, Clause 3(1) required the rent to be paid "*yearly and proportionately for any fraction of a year*". The same form of words was used in the same clause regarding the requirement to pay insurance rent and

service charge. However, the Tenant account statement of the 3rd of October, 2018, invoiced the rent and service charge for the full quarter and invoiced the insurance for the full year. In addition to the Tenant account statement being inconsistent with the terms of Clause 3 (1) as regards service charge, it was inconsistent with Part 4, Clause 7 of the Lease.

303. Within minutes of receipt of the aforementioned email and entirely consistent with the Tenant's approach in seeking to discharge arrears properly computed, Ms. Smith responded by return email stating:

> "*I am awaiting a credit for the Period 15th October – 31st December as our lease ends on the 14th October I spoke to Paul Kelly last week with regards to this*".

304. Mr. Taaffe did not respond with any suggestion that the conversation the previous week was with him rather than Mr. Kelly (as suggested by Mr. Kelly in evidence). More significantly, Mr. Taaffe did not respond at all. Tellingly, Mr. Taaffe was not called to give evidence. It would have been open to Mr. Taaffe or Mr. Kelly to respond to this email by stating that no credit was due and that the amount billed was correct. If they had done so, the Tenant could have decided whether to pay the invoiced amount first and dispute it later. Instead, Ms. Smith was assured that Mason Owen & Lyons would get back to her in relation to her request for a closing statement but they never did.

305. I prefer Ms. Smith's recollection of the conversation over Mr. Kelly's evidence with regard to the question of reconciliation statements, partly because he has no recollection of the conversation at all, but, also, because it is consistent with the contemporaneous documentation (telephone records and the emails of the 3rd of October, 2018). Believing Ms. Smith in the detail of her account, it is striking that Mr. Kelly claimed to have no knowledge of the exercise of the break option. This was patently untrue as he was intimately aware of the fact that the Tenant was seeking to exercise its break option and had been for a long time.

306. In denying knowledge of the break option being exercised to Ms. Smith, I can only conclude that Mr. Kelly was acting in pursuance of a strategy adopted by the Landlord directed to impeding effective reliance on the break clause by not providing an accurate statement of account and by failing to make clear the Landlord's requirements in relation to strip out in a timely manner.

307. Accepting Ms. Smith's evidence, as I do, it seems to me that it was agreed on behalf of the Landlord that a reconciliation statement would be provided to allow for all sums due to the break date to be discharged. On the basis of this conversation, Ms. Smith on behalf of the Tenant was satisfied to await receipt of the reconciliation statement it having been agreed that sums due would only become payable on receipt of the reconciliation statement. It seems to me that the agreed position arrived at in this conversation constituted a variation of Clause 6(10) in relation to a requirement to pay outstanding sums due to the 13th of October, 2018 as at the break date to a requirement to pay upon receipt of a reconciliation statement even if this was after the break date.

308. Even if there was no variation of Clause 6(10) as regards the requirement to have discharged arrears by the break date as I have found, it also seems to me that in agreeing to a break option, the Landlord must be taken to have agreed that it would not render compliance with the conditions of Clause 6(10) almost impossible by withholding necessary information with the result that the break option was entirely illusory and theoretical. In reliance on principles reiterated in *Meridian Communications Ltd. and Cellular Three Ltd. v. Eircell Ltd.* and the cases cited in the judgment of O'Higgins J. in that case, I find that there was a term implied in the Lease that either party would not deliberately seek to frustrate the operation of the agreement by the other. Such a term is not only reasonable (which O'Higgins J. observed would not be sufficient), it was agreed but unexpressed. It seems to me that in agreeing a break clause, it must have been intended that a requirement to pay sums due would not be frustrated by a refusal to communicate what those sums were. This is clearly implicit, if unexpressed, and I am satisfied it "*would pass the officious bystander test*". A party to a contract cannot voluntarily create conditions which will prevent the performance of the contract.

309. I am satisfied that the only logical conclusion to be drawn from Mr. Kelly's actions in failing to provide a reconciliation statement upon request or even communicating that one would not be provided, viewed together with other factors including:

(i) the lack of any formal response to the notice of an intention to exercise the break clause,
(ii) the behind-the-scenes marketing efforts;
(iii)the delay in conducting an inspection;
(iv) the failure of the Landlord to carry out a dilapidations inspection in advance of the break date;
(v) the last-minute communication of grey box strip- out requirement with lack of clarity around the staircase and windows and the final service of a forfeiture notice only eight years later (compared with previous service of such a notice in 2011 for a short-term arrears of rent).

is that the Landlord, appreciating that the market had changed and that the Property would likely not command a level of rent as hitherto, had elected to pursue a strategy of obfuscation designed to frustrate the exercise of the break option.

310. The Landlord's motivation in not facilitating the valid exercise of a break option because it was financially more advantageous to maintain the Tenant's payment obligations under the Lease would not preclude the strict application of the legal requirements for a valid break if the obligations on the Tenant were otherwise clear and intentionally, wilfully or recklessly breached. The law allows little tolerance when it comes to the valid exercise of a break option. It seems to me entirely unjust, however, to attribute culpability to the Tenant for the arrears existing as at the break date in this case, when a careful computation exercise with the benefit of proper information was required to determine exactly what the amount due to the break date was and when the necessary information was not provided. This is because where the terms of a lease are such that the tenant's obligations under that lease are not readily apparent and require third party certification or audit or reconciliation and apportionment as was the case here, there is a duty to be implied if not already expressed to provide the necessary information to enable a proper calculation of sums due and thereby allow the effective

exercise of a break option under that lease. It is almost the invariable practice of landlords, as established on the evidence before me, to furnish a closing statement to enable the Tenant to reconcile its accounts to ensure that as at the date of determination that charges were paid up to date.

311. This is clearly a case where additional information was required as borne out by mistakes on both sides in computing amounts due. The complexity of the computations has been amply demonstrated in the protracted evidence before me. Having heard this evidence, I am satisfied that the Statement of Account furnished at the beginning of October, 2018, was not accurate and it was reasonable for the Tenant to seek a closing statement which reflected the terms of the Lease. Mr. Kelly's calculations were undermined by a number of errors, which he did not dispute in the course of his evidence, principally:-

(i) His calculations included an additional eight days (from 6 April 2008 to 14 April 2008) which ought not to have been included, giving rise to an overestimate of €3,329;
(ii) The insurance credit which he allowed in his calculations was understated by €719:
(iii) His calculations included a sum of €1,051 for water charges where water charges do not arise under the Lease.

312. The very fact that Mr. Kelly has been able to identify four different possible scenarios in respect of sums due under the Lease and the fact errors have been identified both in the calculation underpinning the final statement of account and the figures relied upon in his computations for the purpose of these proceedings serve to illustrate just how complex a process it was to compute the precise sums due as at the break date.

313. Although I have found the Tenant to be wrong in claiming a reduction of €2,913 in respect of a further one-week delay in the Tenant getting possession of the Property, with the result that if the Tenant were correct in this regard there would have been no arrears due to the Landlord by the Tenant on a pro-rata basis (if allowance is made for the fact that water charges are not due under the Lease) or even more minimal arrears,

I have also found that the Lease had been varied to provide for payment of rent monthly in advance with the result that the quarterly payment contained in the Statement of Account furnished on the 3rd of October, 2018, resulted in a significantly inflated bill which the Tenant was correct to query.

314. Separately, it was accepted by Mr. Kelly in evidence that the service charges were not calculated in accordance with the terms of the Lease. Given the acceptance by Mr. Kelly that the service charges as billed were not in accordance with the service charge provisions of the Lease, the Landlord had no entitlement to the service charges claimed in the final statement of account. Significant sums are claimed by the Landlord in respect of service charges alleged to arise after the 13th of October, 2018, but the charges included in the last Statement of Account were not calculated in accordance with the terms of the Lease.

315. A closing statement was clearly necessary in this case to allow for the effective operation of the break clause (not least having regard to the approach to the calculation of VAT and service charges in this case). I have no hesitation in finding on the facts and circumstances and in view of industry practice established in evidence that the obligation to provide such a statement was an implied term of the Lease. This is because absent co-operation on behalf of the Landlord in furnishing a proper statement of account or reconciliation statement, it would have been impossible for the Tenant to calculate the sums due. I am satisfied that the effect of the Landlord's failure to provide a reconciliation statement in this case meant that the Landlord was in breach of its implied duty under the Lease.

316. In the circumstances, it seems to me that the failure to provide information when sought to allow for a proper reconciliation ought not be permitted to frustrate the valid exercise of the break option, as it was never the intention that the break clause be available in theory only. It was intended that the clause provide for a real and effective right to terminate early. It is relevant to my conclusions in this regard that the Tenant had a good track record in meeting obligations under the Lease from 2011 and had requested a reconciliation statement in advance of the break date and furnished proposals in relation to strip-out for Landlord consideration and agreement in a clear signal that it intended to honour its obligations under the Lease.

317. In the absence of any correspondence from the Landlord to correct the Tenant's reliance on a representation that a reconciliation statement would be forthcoming or timely engagement in relation to alternative strip-out requirements, the Landlord should not be permitted to frustrate the exercise of the break option through a breach of an implied duty on the Landlord itself to engage reasonably with the Tenant in relation to the provision of information necessary to pay sums due and meet requirements lawfully made in relation to strip-out and/or reinstatement.

318. By not corresponding in a reasonable, proper, and transparent manner, the Landlord ensured that the Tenant was blindsided when it came to its intention to effectively invoke the break clause to terminate the Lease. The Tenant's difficulties in calculating amounts due is manifest from the uncontested evidence heard of failure on the part of the Landlord to provide audited accountant's certificates in accordance with the terms of the Lease and the Landlord's unilateral reliance on Revenue's tolerance of VAT practices which delay a proper calculation of a Tenant's liability to VAT in respect of services until many months after the break clause of exercised. These factors contributed to an impossibility on the part of the Tenant in accurately calculating sums due.

319. Quite apart from my finding that there has been a breach of an implied duty to provide information to enable the proper calculation of arrears in this case such that it cannot fairly be concluded that the Tenant was in breach of a covenant to pay sums due up to date, I am also satisfied that it would be contrary to the interests of justice to permit the Landlord to rely on arrears of the order in issue in these proceedings to frustrate the operation of the break clause. Strict compliance with conditions precedent to the exercise of a break clause has never been construed as requiring blind application of conditions precedent without regard to the reasonable efforts of the Tenant to meet those conditions precedent, intentionally and wilfully undermined by the Landlord with a view to frustrating the lawful exercise of the right to break. The Landlord is not entitled to take advantage of its own wrong by insisting on a clause which required Landlord cooperation for its effective operation in circumstances where cooperation was not forthcoming.

320. Furthermore, it appears that Ms. Smith made a good estimate when making payment on the 2nd of November, 2018, so that there were in fact no sums due under the Lease from the 2nd of November, 2018. She was slightly over two weeks late in making this payment but only because she awaited hearing from the Landlord in relation to reconciliation. The Tenant cannot be faulted for not appreciating that the Landlord's silence in response to Ms. Smith's request for a reconciliation statement which had been agreed to by Mr. Kelly or in communicating regarding strip-out resulted from a directed practice aimed at frustrating the termination of the Lease and taking precautions to ensure that it performed its best estimate in advance of the break date.

321. In view of what I consider a concerted approach on the part of the Landlord which can only be understood as a designed and deliberate attempt to frustrate the effective exercise of the break option, presumably because of the Landlord's real concern that it would not be able to attract an alternative tenant willing to pay rent at the rate which the Tenant was paying, I do not find the Tenant in breach of its obligation to pay rent up to date as at the break date. Applying the prevention principle and relying on authorities such as *Royal Trust Company of Canada v. Kelly* [1989] IEHC 33 and *Meridian Communications Ltd. v. Eircell Ltd.*, I am satisfied that in entering into the Lease and agreeing to a break clause in the terms of Clause 6 (10), the Landlord agreed to do all that was necessary to be done on its part to render the clause operable as envisaged under the Lease. It was an implied term of the Lease that the Landlord would not do anything to make the break clause inoperable. In breach of an implied term of the Lease, the Landlord sought to frustrate the operation of the break clause by refusing to engage clearly with the Tenant in respect of arrears due.

322. It is patently obvious to me that the Landlord's purpose in obfuscation was a determined endeavour to frustrate the valid exercise of the break clause. This was with a view to standing on its strict legal rights under the Lease by contending that the break had not been validly executed either because monies were owed or that the Property was not properly vacated. I have concluded that in this way, the Landlord sought to mitigate against an inevitable loss to the Landlord because of difficulties in reletting the Property at the previous higher-level rent or at all but in so doing the Landlord acted in breach of an implied term of the Lease that the break option was a real option which could be effectively exercised by the Tenant. I consider the Landlord's actions in this

regard to amount to a breach of an implied duty under the Lease. The Landlord is precluded from relying on the subsequent failure of the Tenant to fully discharge all arrears, which arrears were in any event nominal in the relative scheme of the Lease and sums paid over its term.

323. In the absence of a reconciliation statement from the Landlord as agreed with the Tenant in advance of the break date, I do not find the Tenant in breach of Clause 6(10)(a)(ii) as regard the requirement, up to the time of determination, to observe and perform the Tenant's covenants as to rent, insurance rent and service charges. The Tenant relied on Mr. Kelly's agreement to provide a reconciliation statement and acted on it by not performing her best estimate of sums due (as subsequently done on the 2nd of November, 2018, resulting in an overpayment) before the break date to avoid a situation where the Tenant would be nominally in arrears as at the break date.

324. On the authority of *Doran v. Thompson & Sons Limited* [1978] WJSC-SC 177, [1978] I.R. 223; *Barge Inn Limited v. Quinn Hospitality Ireland Operations 3 Ltd.* [2013] IEHC 387 and *Tyrell v. Wright* [2018] IECA 295, the Landlord is now estopped by its actions from relying on a technical breach of a requirement to pay sums due occasioned by its own failure to provide the promised reconciliation statement and thereby contend that the break clause should not be available to the Tenant. Were the Landlord to be permitted to rely on the strict terms of the break option in all of the circumstances of this case including the assurance given that a reconciliation statement would be forthcoming and the reliance placed on this assurance by not erring on the side of caution in paying sums in excess of sums due (as occurred subsequently), it would have the wholly unconscionable and unfair effect of treating the Tenant as bound by the Lease despite its proper attempts to comply with the pre-conditions of break, which efforts were frustrated by the Landlord.

Breach of Covenant to Provide Vacant Possession

325. It is now necessary to also consider the evidence in relation to Landlord assertions that the purported exercise of the break option was separately invalid by

reason of other breaches of Clause 6(10)(a). Clause 6(10)(a)(iii)-(iv) also requires that the Tenant shall, on the expiration of the break notice, give vacant possession of the entirety of the Property to the Landlord, freed and discharged from all incumbrances and all rights of third parties affecting the same howsoever created, and deliver the Lease to the landlord together with such documentary evidence as the landlord may reasonably require to prove that any incumbrances or rights of third parties which have hitherto affected the property have been discharged or ceased.

326. In their Reply to Defence and Counterclaim, the Landlord pleads that as of midnight on the 13th of October, 2018, the premises were not in the condition required by the Lease for the valid exercise of the break option, insofar as there had been a failure on the part of the Tenant to remove the entirety of their fit-out from the premises. This conflicts, however, with reference in communication with prospective tenants to the fact that the Property was "*just vacated*". It did not fit with the Landlord's strategic narrative to serve a Forfeiture Notice after the 14th of October, 2018, but if it genuinely believed that the Tenant somehow remained in possession despite everything that had preceded the break date, it was open to the Landlord so do (and it did so in November, 2024) to secure vacant possession. It didn't need to do so because it already had it. In my view the contention that the Property was not vacated by the 14th of October, 2018, is entirely artificial and constructed. It is an unworthy contention which I consider divorced from reality on the facts and circumstances of this case.

327. It was neither pleaded nor ever contended in correspondence that the Tenant had not returned the keys and the Centre Manager to whom they were surrendered was not called in evidence. The real factual dispute between the parties was in fact limited to that portion of the Landlord's fit-out which was left in place in the premises as of that date and the contention that by reason of the remaining fit-out, the Property was not vacant.

328. Whilst the Landlords have placed reliance upon Clause 4(6)(c), that clause relates to decoration and repair and not vacant possession. Clause 4(15) relates to alterations and similarly does not, on my reading, bear directly on the question of vacant possession. No authority to contrary effect was relied upon by either party.

329. Even if I am wrong in this, as set out above, Clause 4 (15)(f) requires the Tenant:

> "*At the end of the Term if so required by the Landlord substantially to reinstate the Property or any part thereof to the same condition as it was in when this Lease was granted such reinstatement to be carried out under the supervision and to the reasonable satisfaction of the Landlord's Surveyor.*"

330. This same clause goes on to permit the Landlord to enter the property and remove all unauthorised alterations and additions, at the Tenant's expense, in the event of a breach becoming apparent to the landlord and the tenant failing to remedy it within 14 days of receipt of a written notice. The reinstatement obligation of Clause 4(15)(f) only arises if required by the landlord and envisages the supervision of the landlord's surveyor. Clause 4(15) was never triggered in this case prior to the break date. It cannot be contended that there was a breach of covenant of repair on the part of the Tenant at the end of the term when the clause was not properly invoked before the expiry of the term. Even if it had been triggered, a remedy for failure on the part of the Tenant is provided for within the terms of the Lease by providing that the Landlord may do the work at the Tenant's expense.

331. Arguably the first notice given by the Landlords requiring reinstatement by the Tenant was the email from Mr. Kelly on the 9th of October, 2018; however, this email was certainly not a valid notice served in accordance with the terms of Clause 6(11) of the Lease and would not serve to trigger Tenant obligations under Clause 4(15)(f).

332. Even leaving to one side the formal notice requirements which patently were not observed, the request for "*grey-box"* strip out was sent only four days prior to the break date. The overwhelming weight of the evidence from the experts on both sides was that this period of notice was insufficient to allow the reinstatement of the premises by the break date and I so find.

333. On the 17th of May, 2017, the Tenant served a valid notice of its intention to exercise the break option on the 14th of October, 2018. In the absence of replies to the letters of the 17th of May, 2017, the Tenant issued further letters to the Landlords. No

response was received. No schedule of dilapidations was ever served by the Landlord until late in the lifespan of these proceedings and well after the break date.

334. On the 12th of September, 2018, Mr. Conroy emailed Mr. Kelly regarding vacating the unit and the proposed strip out works, attaching the "*Green Plan*". The Tenant maintains that the strip-out of the premises according to the Green Plan was of benefit to the Landlords and that this was confirmed contemporaneously by the reliance placed upon the Green Plan by the joint letting agents in marketing the property after the break date. There was no dispute but that the Defendant delivered possession of the premises, stripped out according to the Green Plan, which was the only insured strip-out plan discussed and agreed between the parties.

335. On the 19th of September, 2018, Mr. Kelly emailed Mr. Conroy stating that the landlord would like to inspect the unit to view the items which the tenant was proposing to leave and remove and proposed 25th of September 2018 as an inspection date. However, the joint inspection of the 25th of September, 2018, never took place and in my view, the fault for this primarily lay with the Landlord who changed the time late in the day and did not wait or reattend for inspection later in the day. A joint inspection never proceeded, but the Landlord attended with Mr. Kelly on the 2nd of October, 2018. Despite this, they delayed further until the 9th of October, 2018, before making the request for reinstatement works ("*Grey Box*") with which compliance in advance of the break date was by then impossible. Mr. Kelly confirmed in evidence that he emailed the Defendant on the 27th of September, 2018, to secure insurance for the strip-out works. Thereafter, the Centre Manager, Ruth Cody, engaged with the insurer and the Tenant's contractor. These communications were all premised upon the scope of works in the said Green Plan.

336. By email of the 4th of October, 2024, Ms Cody stated:

"*FYI below. All in Order. When will you be on site.*"

The Tenant's contractor began work on foot of this exchange and pursuant to the Green Plan. The replying emails from Mr. Conroy on the 9th and 10th of October, 2018, are

also relevant, as is the failure of Mr. Kelly to respond to either of them in writing. On the 9th of October, 2018, Mr. Conroy stated:

> "*I will revert to you. That includes the stairs, installed by the tenant.*"

337. The possible removal of the stairs, and the shopfront which had been fitted by the Tenant, could not sensibly have been sought by the Landlords in good faith as of that date. Mr. Conroy's further email on the 10th of October, 2018, stated that the request was very late in the day, that it was not then possible to facilitate the request within the available time and that the Defendant considered it unreasonable. The email went on to state that the Defendant was:

> "*happy to meet to discuss the detail of the request but 'only' once a clear acceptance that these suggested works are actually not possible within the timescale remaining [sic.].*"

It also stated:

> "*We are proceeding with the strip out we intended to do and had discussed up to now, to your email of late yesterday. Works beyond that will be, after the break date' [sic.] and by agreement.*"

However, no response ever issued from the Landlord to this email.

338. I am satisfied that the Tenant was sufficiently pro-active by giving 17 months' notice of its intention to exercise the break option and in contacting the Landlord to discuss its requirements including by making a proposal in writing a month before the break date, securing approval for the insurance indemnity put in place by its contractor and facilitating inspection to ascertain what fit-out the Landlord wished to have

removed. In my view, the failure on the part of the Landlord to engage with the Tenant to make clear that it required a full strip-out in a timely manner is explicable only as an attempt by the Landlord to frustrate reliance on the break clause. In my view, by communicating late and in vague terms on the 10th of October, 2018, the Landlord hoped to bolster its argument that the break option had not been validly exercised.

339. Although the Tenant served notice to break the Lease in accordance with the terms of the Lease, the Landlord elected to ignore this notice. While there is some evidence that the Landlord considered that there might have been posturing involved on the part of the Tenant to negotiate a rent reduction and this may explain the lack of Landlord response, it is my view that it was clear by the summer of 2018 that the Tenant's intention to break the Lease was real. This was communicated on its behalf in response to overtures in respect of a reduction of rent or accommodation elsewhere on the campus. Even then, there was a lack of any formal or clear response on the part of the Landlord in respect of its requirements *vis-à-vis* the Property being vacated.

340. The Landlord complains that the Tenant did not engage in a timely manner in relation to its requirements in relation to the yield up condition of the premises. Nonetheless, the evidence shows that the Landlord did not communicate its requirements following the service of notice of intention to break the lease and for a very considerable time afterwards. When it finally did, it did so both late and in an unclear manner.

341. Despite the Landlord's own expert evidence to the effect that it is common for the landlord and the tenant to appoint Building Surveyors to agree on the scope of outstanding works which the tenant is obliged to carry out and to agree on the value of the works and consequential costs, this clearly did not occur in this case. With the benefit of hindsight, the Tenant's approach may appear unduly relaxed in this regard, but on the basis of the evidence I can understand that the Tenant was not alarmed by the Landlord's lack of engagement because it was reassured by contact from prospective tenants that the property was likely to be re-let in the food and beverages sector, with the result that there was unlikely to be an issue in relation to strip-out. The Tenant's complacency in this regard was not entirely unreasonable given that no Notice of Dilapidations was ever served before the break date and the Landlord did not

communicate in a timely manner in relation to the Tenant's proposal for strip- out and approved the insurance cover in place for the contractor engaged to carry out the strip-out.

342. The Landlord's communication in relation to its requirement, such as they were, were piecemeal and late. Indeed, it is apparent that the Landlord's requirements in relation to strip-out did not crystallise until days before the break date, despite the presentation of a formal proposal, in line with ongoing discussions almost a month previously. On the Landlord's own evidence, this was an almost impossible timeframe having regard to the need to appoint a contractor, have insurances in place and put in place logistics regarding working hours, access for contractors, parking, removal of debris *etc.* agreed and the works completed prior to the break date.

343. The fact that the Landlord's requirements had not crystallised is evidenced by several factors including the fact that the Landlord marketed the property prior to termination with tenant fit-out still in position (notably, cold rooms, internal staircase and ground floor glazing) and continued to market it subsequently on the basis that the fit-out was a positive feature. It is further evidenced by the fact that despite ongoing discussions and communication prior to the break date over the course of the summer of 2018, the Landlord only sought to inspect the property in response to a formal proposal in writing from the Tenant on the 12th of September, 2018. This request was only communicated by email on 19th of September, 2018.

344. Despite the late date of the request, the Landlord through its inflexibility and poor communication with the Tenant did not conduct an inspection on the first agreed inspection time and only advised the Tenant of a requirement to fully strip the unit to yield it in "*grey box*" condition on the 9th of October, 2018. I find the failure of the Landlord to return to conduct an inspection at some point on the 25th of September, 2018, notwithstanding being present on site for meetings that day, supports a conclusion that the Landlord's motivation by then was to seek to frustrate the valid exercise of the break option.

345. By the time the grey box strip-out request was made, there were only four days remaining on the Lease and the Landlord's Insurer had already signed off, through

Centre Management, on the Tenant's proposed strip-out as previously communicated in writing in some detail. Even at that late stage, the Landlord varied its request for a grey box strip- out when confronted by the Tenant with the fact that this meant removal of the stairs and downstairs glazing, then suggesting that these could be left *in situ*. It is impossible to read this email exchange as other than confirming an overall lack of clarity on the part of the Landlord as to what its requirements regarding strip-out were. When the Tenant responded to point out the impossibility of complying with this late request in the period remaining in advance of the termination date and inviting the Landlord to engage as to its requirements by agreement, it received no response.

346. On the basis of the foregoing, I find that the Tenant was frustrated in its *bona fide* efforts to break the Lease in full compliance with its obligations under the Lease by the Landlord's failure to engage in a reasonable fashion with the Tenant in an appropriate and timely manner. I have concluded that the only inference to be drawn from the pattern of engagement between the Landlord and Tenant in relation to the strip-out of the property and the failure of the Landlord to clearly communicate its wishes in a timely and reasonable manner (particularly when combined with refusal to communicate clearly in relation to a reconciliation statement), is that the Landlord was seeking to frustrate the exercise of the break option, because it was aware that obtaining a similar tenant at the desired rent was not a likely proposition at that time. On the authorities cited above (including *Doran v. Thompson & Sons Limited*; *Barge Inn Limited v. Quinn Hospitality Ireland Operations 3 Ltd.* and *Tyrell v. Wright*), the Landlord may not now rely on a failure to strip-out as a breach of a covenant to provide vacant possession as this was occasioned by its own failure to communicate its requirements in this regard in a timely and reasonable manner despite appropriate engagement from the Tenant.

347. The Tenant vacated the property on the 13th of October, 2018, leaving it in its present condition. The Landlord complains that the Tenant made no effort to resolve their liabilities for dilapidations after they vacated the premises. It is clear from the email exchange between the Landlord and Tenant immediately prior to the Tenant leaving the property, however, that the Tenant remained willing to carry out works with Landlord agreement. The Landlord did not engage with the Tenant in response to an invitation to do so. I am forced to conclude that the reason the Landlord did not engage

with the Tenant in respect of this offer was either because it wished to assert its rights under the Lease by maintaining that the break option had not been validly exercised or it accepted that the remaining fit-out might make the property more attractive to a prospective tenant. It is possible that it was a mixture of the two.

348. It is contended on behalf of the Landlord that by failing to complete its strip-out, the Tenant did not provide back possession to the Landlord. Despite this, the evidence establishes that the Landlord has continued to quietly market the property to prospective tenants, albeit without success. The Tenant also claims that the Landlord has commercialised the property by allowing it to be used for poster display. Evidence has been led in relation to the existence of posters advertising a circus in the unit during the summer of 2023. I do not need to make any findings as to how these posters were placed in the unit to conclude that vacant possession had been provided to the Landlord.

349. Accordingly, by reason of their conduct leading up to the email of the 9th of October, 2018 and the lateness of its request for a "*grey-box*" strip out, the Landlord cannot rely upon the presence that portion of the Tenant's fit-out which was left in place as of the break date, either as a result of estoppel by representation or by the operation of the prevention principle, to contend that there has been a failure to render vacant possession because some fit-out remained. Had the Landlord requested removal of the outstanding fit-out in sufficient time to permit its removal by the break option date, a failure to do so might found the basis of an argument that the Tenant be precluded from reliance on the break clause but this is not what occurred in this case.

350. Insofar as there was a failure on the part of the Tenant to return the Property in the desired condition by the removal of remaining fit-out and returning the property to grey box condition, this occurred because of the Landlord's behaviour and was a state of affairs which suited the Landlord's purposes in contending that the break option had not been properly exercised. It may be addressed in an award of damages referrable to the costs of conducting the full strip-out which the Landlord had sought late in the day. The Landlord's case that vacant possession was not rendered on the 13th of October, 2018, has not been established. Given the lateness of the request for "*grey box*" strip out, the Landlord's remedy in respect of the Tenant's obligations as to the condition of

the Property at the break date is a remedy in damages and not a finding that there has been a failure to render vacant possession.

351. I am satisfied that the Tenant provided the Landlord with possession of the premises on 13th of October, 2018 in accordance with its obligations under Clause 6(10)(c)(iii) of the Lease.

Condition re: Documentation

352. The Landlord has not identified in any clear or meaningful way how the Tenant has failed to comply with an obligation under Clause 6(10)(a)(iv) which requires that the Tenant shall, on the expiration of the break notice, deliver the Lease to the landlord together with such documentary evidence as the landlord may reasonably require to prove that any incumbrances or rights of third parties which have hitherto affected the property have been discharged or ceased. The Landlord has not correspondence with the Tenant prior to the issue of these proceedings requesting any documentation. No concern arises in this case with regard to any incumbrances or rights of third parties and the Property has been vacant for upwards of six years since the Tenant vacated. It has not been established to my satisfaction that there has been any meaningful breach of condition on the part of the Tenant in this regard, thereby invalidating the exercise of the break option and it seems to me that the Landlord invokes the clause opportunistically in circumstances where it does not require the return of any documentation and is not affected in any way as to its ability to relet the Property because documentation has not been returned to the Landlord.

Dilapidations, the Duty to Reinstate and Damages

353. Although failure to comply with the Lease requirement that fit-out be removed if the landlord so requests has not been found to operate to frustrate the exercise of the break clause in this case as a condition vacant possession where the request was not

made in a reasonably timely manner, nonetheless I am satisfied that the requirement to strip-out arises under the Lease as a Tenant obligation when requested by the Landlord and/or pursuant to Clause 4(6)(c) of the Lease. It seems to me that the Tenant cannot legitimately contend that it was not in breach of its obligation to provide vacant possession but also treat itself as being held free from all liability in respect of the cost of removing fit-out and reinstating the Property.

354. While I have found that in the absence of a timely request for the removal of fit-out and requirements in relation to the reinstatement of the Property, the Tenant's covenant as to vacant possession has not been breached to preclude an effective break of the Lease, the cost of removing fit-out and reinstating the Property, are costs which the Tenant is liable to bear under the terms of the Lease unless it is agreed that fit-out may remain. My conclusion that there was not a breach of the covenant to provide vacant possession was made because of the timing and manner of the grey box strip out request but it would be unjust were the Landlord to find itself out of pocket for reinstatement and repair works not performed by the Tenant in advance of the break date because it did not make its requirements clear sufficiently in advance.

355. The fact that I have criticised the Landlord's approach to the exercise of the break option and its behaviour in seeking to frustrate the effective exercise of that option in this judgment, does not mean that I hold the Tenant entirely blameless in the dispute which has been protracted. There were rights and wrongs on both sides in this case. By way of example, the fact that an inspection did not occur on the 25th of September, 2018, arose both from a brief lateness in attendance on behalf of the Tenant at the arranged inspection and a lack of flexibility on the part of the Landlord in returning during the course of that day, even while at the Shopping Centre for other business. The email of the 10th of October, 2018 from the Tenant to the Landlord acknowledges the possibility of the Tenant undertaking strip out works after the break date by agreement, implicitly acknowledging Tenant responsibility in this regard but clearly mindful that any work it would undertake would not be construed as it being still in possession as at the break date. Properly both sides ought to have engaged in relation to the cost of strip out at that time, but they did not do so presumably from a desire to preserve their respective positions in relation to the break option.

356. Against this background these proceedings were not advanced as a claim for damages in respect of a failure to strip out as the Landlord's primary objective was to stand on its rights under Clause 6(10) to preclude reliance on the break clause. Nonetheless, on the case as pleaded, the Landlord sought payment of such sums as it is entitled to as the court sees fit and further or other order. I note that in its Reply and Defence to Counterclaim, the Landlord relied on the Tenant's failure to remove fit out (albeit on the basis that this constituted a failure to provide vacant possession). As the case progressed, all issues were properly before me, including issues regarding the state of repair of the Property and the cost of remedial works. Furthermore, experts were engaged on both sides in relation to the condition of the Property as at the break date, the existence of remaining fit-out *in situ* and the obligation to strip-out under the Lease.

357. In my view, the Tenant could have been more vigilant to ascertain the Landlord's wishes in respect of strip-out in advance of the break date. Although properly the Landlord ought to have engaged with the Tenant to seek to agree strip-out and reinstatement works as envisaged under the Lease in response to the Tenant's conditional invitation in this regard, at this remove considering both the passage of time and the course of litigation, it seems to me that there is now no reality to requiring this type of engagement and to do so will simply add to costs and delay.

358. Instead, in my view, the appropriate remedy is that the matter of strip-out, repair and decoration be addressed through an appropriate award of damages having regard to the provisions of Clause 4(6)(c) of the Lease which places a clear obligation on the Tenant to yield up the Property duly repaired and decorated and to make good any damage cause to the Property by the removal of the Tenant's fixtures and fittings, furniture and effects and by the reinstatement of the Property. In my view, the requirement for the Tenant to meet these costs also flows consequent upon my finding that the condition of the property was not an impediment to the exercise of the break option as a breach of a requirement to provide vacant possession.

359. Based on an inspection several years after the Tenant vacated, the Landlord's expert Mr. John Duffy, Chartered Surveyor, gave extensive evidence of the dilapidated state of the premises and the continued presence therein of the Tenant's fit-out, which

it had failed to remove by the break option date. Mr. Duffy estimated the present-day value of the works associated with removal of this outstanding fitout to be in the sum of €161,522.07 excluding VAT on construction costs and professional fees. Although Mr. Fitzpatrick, for the Tenant, countered Mr. Duffy's evidence by contending that fit out left *in situ* could have a residual value to the Landlord and suggested that the Property had deteriorated further since October, 2018 and this was not the Tenant responsibility, he did not contest any specific item of costing advanced by Mr. Duffy, notwithstanding his background and expertise in this area.

360. While it was argued on behalf of the Tenant that the Property was not dilapidated as of the break date and only became so later, it appears to me from the photos that the Property is structurally in the same condition that it was in October, 2018, and the Property was left in a condition which required further strip out and extensive redecoration before it could be occupied by a new tenant for use as a restaurant or any other use.

361. Having carefully reviewed the Schedule of Dilapidations and photographs accompanying his report, I accept Mr Duffy's evidence that a significant number of dilapidations, including a breach of Building Regulations, subsisted prior to the break date and are not the mere result of effluxion of time. While the figure of €161,522.07 appears high it is computed in a detailed manner and by reference to actual costs incurred in strip-out, costs the level of which Mr. Fitzpatrick did not dispute.

362. Strip out was a Tenant responsibility under the Lease but this work was not done by the Tenant prior to vacating the Property or by subsequent agreement with the Landlord. I am satisfied on the evidence in this case and in circumstances where the Tenant is not being held to obligations under the Lease which might otherwise have flowed from the fact that it was in arrears of rent as at the break date were it not for the behaviour of the Landlord (notably in failing to provide a reconciliation statement as agreed) and had not reached agreement with the Landlord in relation to the strip out of the Property before the break date (or subsequently), that the Landlord is entitled to be compensated for the costs of stripping out the Property. I propose to allow the costs in full as set out in Mr. Duffy's Schedule and as substantiated by his evidence.

363. On the basis that it would take several weeks to do this work, I am further satisfied that the Landlord is also entitled to be compensated for loss of rent and other costs during this period in accordance with Clause 4(6)(c)(vi) of the Lease. Had the works been undertaken by the Tenant prior to vacating the premises, it would equally have prevented it trading for several weeks whilst paying rent. I would allow a sum representing one month's rent, service charge and rates in this regard in the sum of €12,812. Together with €161,522.07 in respect of dilapidations this totals to a sum of €174,334.07 due to the Landlord from the Tenant less any entitlement to set off established in respect of overpayment resulting from the payment made on the 2nd of November, 2018 in the absence of a reconciliation statement.

364. As already noted, I am satisfied that arrears of rent, service charge and insurance were sufficiently discharged by the payment made by Ms. Smith on behalf of the Tenant on the 2nd of November, 2018, on the basis of her best estimate. In fact, a slight overpayment was made on that date having regard to the fact that the rent-free period (ending on the 14th of April, 2008) had not been properly factored in by her in making her estimate. On my assessment of the evidence heard, the overpayment was in the sum of €3,888.01.

365. In the circumstances, following a deduction in respect of overpaid rent, insurance rent and service charges in the sum of €3,888.01, I measure sums now due to the Landlord from the Tenant under the Lease as €170,454.00 (being €174,334.00 less €3,888.00).

CONCLUSIONS

366. I have concluded that the rent-free period ran from the 14th of April, 2009 and not the 21st as the Tenant contended. The Lease was varied to allow for payment of rent monthly in advance and as at the break date the obligation was to pay rent monthly in advance and service charges quarterly in advance and that there was a nominal shortfall as between the sums paid and the sums due as at the break date.

367. By their actions in agreeing this variation and accepting rent on this basis over a period of some seven years, the Landlord is estopped from relying on the strict terms of the Lease which no longer reflected the custom and practice of the parties regarding rent payments, by way of variation to their original agreement.

368. The Tenant was in arrears as at the break date. To the extent that there was a failure to accurately calculate sums due (in the order of €3,699.84), the failure was nominal in relative terms in view of an annual rent bill of €125,000 and a services bill of approximately €16,000.00. It was an implied term of the Lease that the Tenant would not be prevented from lawful reliance on a break clause through a deliberate strategy of the Landlord in impeding the Tenant discharging sums due under the Lease by refusing to provide either a reconciliation statement or the information necessary to calculate sums properly due and owing.

369. The Tenant requested a reconciliation statement in advance of the break date, but, in bad faith, the Landlord elected not to provide one in accordance with industry practice and contrary to its agreement to do so without then communicating its refusal in a clear and timely manner. This was in breach of Landlord duty and was a tactic deployed as a means of frustrating the effective exercise of the break option.

370. The Tenant endeavoured to comply with the terms of Clause 6(10)(a)(ii), (iii) and (iv) of the Lease, but was prevented from doing so by the Landlord's deliberate efforts to frustrate same. Where the Tenant has made reasonable efforts to properly calculate sums due and owing to ensure the proper discharge of its legal obligations as to rent and service charges on the basis of information available and having sought and agreed it would be furnished with a reconciliation statement which would provide the information necessary to accurately calculate sums due, a failure to exactly calculate the sum due or a slight delay in doing because the promised reconciliation statement was not provided, does not operate to invalidate the exercise of the break option. The Landlord may not rely on his own wrongdoing to frustrate reliance on the said clause.

371. Similarly, in failing to clarify the extent of strip-out required in a timely manner, the Landlord may not treat the Tenant as being in breach of covenant under the Lease

to render vacant possession. Nonetheless, the Tenant remains liable for the reasonable costs of reinstatement under the Lease.

372. For the reasons set out above, I will make a decree in the Landlord's favour in the amount of €170,454.00.

373. These proceedings will be listed before me following the expiry of fourteen days from the date of electronic delivery of this judgment for the purpose of ruling on final orders and dealing with any consequential matters not agreed by the parties. I will hear the parties on any matter arising at that time.